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Please cite paper as:

Coleman, Nicholas, Andromachi Georgosouli, and Tara Rice (2018). Measuring the Implementation of the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions in the European Union. International Finance Discussion Papers 1238.



International Finance Discussion Papers

Board of Governors of the Federal Reserve System

Number 1238

October 2018

Measuring the Implementation of the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions in the European Union

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October 2018

Abstract

There are lingering concerns about the health of European banks and extensive market commentary about whether post-crisis regulatory reforms in Europe have adequately addressed these concerns. In June 2012, European policymakers released the broad outlines of a proposal for a "European banking union" to strengthen the banking sector and help assuage concerns of investors and depositors, however, uncertainty remains regarding how the new EU bank resolution regime, the Bank Recovery and Resolution Directive (BRRD), will work in practice. This paper addresses whether the BRRD has fulfilled the requirements of the FSB Key Attributes for Resolution Regimes, which many take to be the gold standard bank resolution framework. We find that the BRRD diverges from the FSB Key Attributes or allows variation at the Member State level in multiple areas. The majority of these variations point to slight inconsistencies with the FSB recommendations. That said, some variations may have a larger impact than others.

Key words: FSB Key Attributes, BRRD, European Banks

JEL Categories: G21, G28, K23

* Federal Reserve Board; CCLS, QMUL; and formerly Federal Reserve Board, respectively. We wish to thank S. Claessens, E. Huepkes, S. Cappiello, A. Lodge, and participants at the 2016 CCLS Roundtable on Financial Regulation for feedback. We are also very grateful to S. Papagiannidou, E. Foteinou, K. Flessiopolou, T. Lambrinou, I. Tsikripis, P. Machas, T. Kyriakopoulos, S. Potamitis, M. Psaltis, A. Xenofos, and G. Michelis for discussions on the implementation of the BRRD in Greece. The views expressed are those of the authors and not necessarily those of the Federal Reserve Board or the Federal Reserve System. Any errors remain our own.

Introduction

In early 2010, in the wake of the European sovereign debt crisis, many European banks, burdened with high levels of nonperforming loans, weak capital positions, and a significant amount of sovereign debt, faced considerable financial strain. In response, European policymakers implemented a series of financial support measures including the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), while the European Central Bank (ECB) announced additional measures to an already accommodative monetary policy, including large-scale asset purchases and provision of liquidity to the banks. Financial conditions of the sovereigns and the banks continued to deteriorate over the course of 2011.

In June 2012, European policymakers released the broad outlines of a proposal for a “European banking union” to strengthen the banking sector and help assuage concerns of investors and depositors, thus helping to prevent a further intensification of the crisis. The European Commission, together with the ECB and the President of the European Council, put forward a long-term vision for a European Banking Union that would rest on three pillars supported by a common rule book. The three pillars are: (1) a Single Supervisory Mechanism (SSM); (2) a Single Resolution Mechanism (SRM); and (3) a common deposit insurance guarantee fund known as the European Deposit Insurance Scheme (EDIS).¹

The SRM regulation established the framework for resolution of banks in the banking union and established the Single Resolution Board (SRB) in 2015. Overlaying the EU bank resolution regime is the Bank Recovery and Resolution Directive (BRRD), which entered into force in July 2014 and established the overarching framework for the recovery and resolution of credit institutions and investment firms in the EU. The BRRD is a directive, and, as such, sets out an objective or policy to be attained but gives Member States some discretion in how that particular objective or policy is implemented.

In the six years since the original proposal was released, much progress has been made in the creation of the Banking Union and further market, legal, and institutional convergence. The SSM

¹ The Banking Union is an institutional set-up that provides a common framework for the supervision of banks through the SSM, for the resolution of troubled banks and certain investment firms through the SRM, and for the availability of deposit guarantee schemes through the creation in due course of an EDIS for Eurozone countries participating in the Banking Union and those that wish to opt in. For a general discussion of the Banking Union, see Lastra (2013) and Alexander (2015).

entered into force in late 2014 with the ECB assuming direct supervision of the most “significant” banks in the euro zone.

However, recent banking stresses in Italy, Portugal and Spain demonstrate the potential financial stability implications when investors are uncertain about their losses in the event of a bank failure. It illustrates the trade-off between Member States’ flexibility to design aspects of EU policy in accordance with their individual jurisdictions’ legal and institutional structures and the uncertainty of implementation or interpretation of those laws across jurisdictions. The experience with the handling of troubled banks in Italy offers a case study of issues that may arise in practice. These issues are briefly considered below. That said, a comprehensive report on the handling of failing banks in various Member States under the BRRD resolution framework falls beyond the scope of this study.

It is the scope of this variation in possible implementation of the BRRD that this study explores. In summary, we find a large degree of consistency between the BRRD and the Financial Stability Board (FSB) Key Attributes (KA). We do find the potential for Member State variation in a number of areas, but the majority of these variations point to slight inconsistencies with the FSB standards. Three noteworthy areas of variation pertain to: (a) the scope of the BRRD compared with the recommended scope of effective resolution regimes by the FSB Key Attributes; (b) the moratorium tools in the BRRD and (c) harmonization of the protection of creditors (creditor hierarchy) in insolvency. That said, the November 2016 legislative proposal amending the BRRD (and October 2017 announcement) address the latter two areas by introducing a new moratorium tool and modifying creditor hierarchy in insolvency.²

The remainder of the paper is organized as follows. Section I provides an overview of the BRRD. Section II describes the consistency index. Section III offers a brief overview of the FSB Key Attributes, which this study uses as a benchmark for assessing effectiveness. Section IV considers the consistency of the BRRD to the FSB Key Attributes. Specifically, it identifies sources of variation between the BRRD and the FSB Key Attributes and includes an overview of the implementation of the BRRD in Germany, Italy, the United Kingdom, and Greece. Section V concludes with a summary and next steps. Annex A provides a detailed analysis of the scoring,

² Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC, and Directive 2007/36/EC.

Annex B provides more information on the FSB Key Attributes, and Annex C discusses how the SRM Regulation affects consistency index scoring.

I. Overview of the Bank Recovery and Resolution Directive

The BRRD and the SRM Regulation stand at the epicenter of the EU bank resolution regime.³ The BRRD is composed of substantive legal requirements on the recovery and resolution of banks and large investment firms.⁴ These rules provide for administrative (as opposed to court-based) proceedings, early intervention, recovery measures and resolution tools, and a common set of powers for national resolution authorities. The legal provisions of the BRRD fall under the following thematic areas: (a) general provisions on the subject matter, scope definitions, and designation of national resolution authorities; (b) preparation (recovery and resolution planning); (c) early intervention; (d) resolution (conditions of resolution, objectives of resolution, resolution tools, resolution powers, and safeguards); (e) cross-border resolution; (f) relations with third countries; (g) financing arrangements; (h) penalties and other miscellaneous provisions (powers of execution, amendments to Directives, final provisions that inter alia refer to the European Banking Authority (EBA) Resolution Committee, and an Annex). The BRRD applies to all 28 Member States and thus regulates bank resolution both within and outside the Banking Union.⁵ As of November 2016 two amendments have been proposed to the BRRD: The introduction of a pre-resolution moratorium and amendments to the insolvency ranking of creditors.

Overlaying the BRRD is a complex institutional architecture through which bank resolution is put into operation. This institutional architecture consists of two partially overlapping spheres of public governance. Within the Banking Union, the SRM Regulation constitutes the foundation of the SRM—a quasi-centralized system of decision making for the resolution of banks authorized in

³ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (OJ L 173, 12.6.2014, p. 190), henceforth referred to as the BRRD. For a general commentary on the BRRD, see Binder and Singh (2016); and Hu (2015). Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 SRM Regulation (OJ L 225, 30.7.2014, p. 1), henceforth referred to as the ‘Single Resolution Mechanism Regulation’ or ‘SRMR’.

⁴ Specifically, the BRRD applies only to credit institutions, as these are defined under the Capital Requirements Regulation (CRR) (that is, banks and certain other deposit takers), parent undertakings including financial holding companies and mixed financial holding companies that are subject to consolidated supervision of the ECB under the SSM, and investment firms and financial institutions when covered by consolidated supervision of the parent undertaking under the CRR. The resolution of insurance firms and central counterparties (CCPs) is not covered. See BRRD Article 1(1). As of November 2016, two amendments have been proposed to the BRRD: The introduction of a pre-resolution moratorium and amendments to the insolvency ranking of creditors

⁵ The Banking Union is composed of the 19 euro-area countries plus any non-euro-area European Union Member States that opt into the Banking Union. To date, only Eurozone countries participate in the Banking Union.

Eurozone countries under the leadership of the SRB.⁶ Outside the Banking Union, the BRRD establishes a more decentralized system of bank resolution. Under the BRRD, bank resolution remains in the hands of national resolution authorities, but any actions taken by national resolution authorities are monitored, supervised, and, where appropriate, coordinated by the EBA.

Two questions related to the scope of variation inherent in the EU legal framework of bank resolution arise. First, is the EU legal framework effective in meeting the objectives of a well-designed resolution framework? And, second, is the EU legal framework robust enough so that, when put into practice, the national discretion built into the framework does not lead to deviations that could undermine its effectiveness? In other words, does the BRRD allow discretion that could potentially lead to either (1) uncertainty in execution or enforcement that may, in turn, result in greater financial stability risks or (2) implementation that results in financial-sector fragmentation rather than the promotion of international harmonization of financial regulations?

We address these two questions in our study. Assessing whether the BRRD is a well-designed resolution regime requires a benchmark of “effectiveness.” Here we draw on work by the FSB and, in particular, the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions 2014 (“Key Attributes”). The Key Attributes “set out the core elements that the FSB considers to be necessary for an effective resolution regime. Their implementation should allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions” (FSB 2014). These mechanisms should internalize costs so that losses are absorbed by shareholders and unsecured and uninsured creditors in a manner that respects the hierarchy of claims in liquidation.

Our examination of Member States’ implementation of the BRRD for variation across borders and consistency to the Key Attributes is quite narrow. Due to the complexity of this exercise, we look at four Member States: Germany, Italy, the United Kingdom, and Greece. Put simply, our exercise is to map the BRRD to the Key Attributes and then map the individual Member States’ implementation to the BRRD.

⁶ The SRB is an EU agency with a special resolution mandate for the purposes of the SRM, but it is ‘Single’ only by name. The Commission, the Council, and the ECB are also involved in decisions and actions. The SRM operates under the leadership of SRB Article 7(1) SRM Regulation (stipulating that the SRB is responsible for the effective and consistent functioning of the SRM). The SRB is directly responsible for the resolution of systemically significant banks (and investment firms) (SRMR Articles 5(1) and 7(2)). The national resolution authorities are directly responsible for the resolution of all other banks and investment firms—namely, small- and medium-sized domestic entities subject to certain exceptions such as, for example, when the Single Resolution Fund is to be used (SRMR Article 7(3)). For a general discussion, see Georgosouli, (2016).

The examination of the legal framework and the policies governing the resolution regime of the BRRD and in four Member States is similar, in part, to the ongoing work in the FSB (2016). However, our work is different from the work done at the FSB in three ways. First, we examine whether the BRRD is in line with the FSB's Key Attributes. To our knowledge, the FSB peer reviews have examined six Member States' implementation of their resolution regime and have not assessed the consistency with the BRRD directly. The BRRD deserves special consideration in its own right, however, as it is the only quasi-supranational legal vehicle in Europe through which international standards of bank resolution are transposed into domestic law and the only legal instrument dedicated to regional convergence of laws of EU Member States. Second, we examine all of the FSB attributes, whereas the recent FSB peer review examined three key attributes. Third, we create a quantitative method, or index, by which to assess consistency and cross-border variation. The quantification of the Member States' consistency with the key attributes and eventual extension of our method to other countries will allow cross-country comparison of resolution regimes at a level that has not been previously possible. While the FSB adopts a four-grade assessment scale ((a) compliant, (b) largely compliant, (c) materially non-compliant, and (d) non-compliant), the goal of the assessment is to focus the attention of the authorities on areas that need improvements and to suggest an Action Plan. Our aim is to create a mechanism by which countries' resolution regimes can be assessed quantitatively. In making assessments, we are moving from the FSBs qualitative four-point scale to a continuous index that ranges from 0 to 1.

II. The Consistency Index

To construct our index, we compare the text of the FSB Key Attributes of 2014 with the text of the BRRD, focusing, in particular, on the Article of the BRRD that we find to have the closest relevance to the Key Attribute in question, taking into account its title, content, and overall place in the text of the Directive. First, we check for absolute literal consistency. Where there are differences in the language used, we proceed to investigate whether these differences point to actual variations between the FSB Key Attribute in question and the relevant BRRD Article or, alternatively, whether they can be attributed to the use of different terminology, structural, or other technical features of the two legal instruments. To this end, we interpret the Article of the Directive with the closest relevance to the Key Attribute under examination in light of other relevant BRRD provisions and recitals of the Preamble to the Directive as well as other primary and secondary legal sources, where appropriate. We do the same with our comparison to the BRRD and our

sample of national legislations in order to offer a preliminary assessment of the implementation of the FSB Key Attributes in individual Member States. Finally, we measure the impact of the SRM Regulation on the level of consistency with the EU legal framework of bank resolution to the FSB Key Attributes within the Banking Union.

We build our index by examining every item in the Key Attributes alongside the BRRD. There are 12 Key Attributes, each of which has multiple individual elements. For each element, we assign a value of 0, 0.5, or 1 to the BRRD depending on its consistency with the Key Attributes. If the BRRD fully complies with the element in the Key Attribute, then it is assigned a value of 1. If it does not comply at all or is absent (not mentioned), then it is assigned a value of 0. If it partially adheres, then it is assigned a value of 0.5. For each Key Attribute, we sum the assigned numbers (0, 0.5, 1) over all elements and then divide by the number of elements in that Key Attribute. Note that when there are sub-elements of elements within a Key Attribute, we average across the sub-elements to obtain the score for each element before averaging across the elements of a Key Attribute. We do this for all 12 Key Attributes and then average the individual Key Attribute scores over all Key Attributes. While this method allows for cross-country comparison when other jurisdictions are added to our sample, it has three drawbacks: (1) it is very labor intensive; (2) some subjectivity is unavoidable since we must make a judgment on those items that do not clearly adhere to the entire element; and (3) we take simple averages across all elements of the Key Attributes and then across all the 12 Key Attributes and which equally weights all elements. We acknowledge that some elements may be more important than others and, therefore, deserve greater weight. However, it is difficult to make judgments on which of the Key Attributes (or their elements) are more or less important than the others, and their relative importance may vary by jurisdiction. Finally, we examine the consistency of the BRRD to the FSB Key Attributes, also taking into account the impact of the SRM Regulation in the case of Eurozone Member States participating in the Banking Union. Of course, any full assessment of the implementation of the FSB Key Attributes in the EU involves examination of other EU legal instruments—for example, EBA technical and implementing standards and guidelines as well as relevant national legislation.

III. The FSB's Key Attributes as a Benchmark for Assessing Effectiveness

This section describes the FSB's Key Attributes in detail and draws directly from the 2014 publication. More information on the Key Attributes is in Annex B.

“The Key Attributes set out the core elements that the FSB considers to be necessary for an effective resolution regime. Their implementation should allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions. The *Key Attributes* set out twelve essential features that should be part of the resolution regimes of all jurisdictions. They relate to:

1. Scope
2. Resolution authority
3. Resolution powers
4. Set-off, netting, collateralization, segregation of client assets
5. Safeguards
6. Funding of firms in resolution
7. Legal framework conditions for cross-border cooperation
8. Crisis Management Groups (CMGs)
9. Institution-specific cross-border cooperation agreements
10. Resolvability assessments
11. Recovery and resolution planning
12. Access to information and information sharing.”

As the internationally agreed-upon principles that were developed by subject matter experts and rigorously vetted by member countries, we take the FSB Key Attributes to be the standard by which countries should model and judge their individual resolution regimes. We build our analysis on this assumption. It may be possible that the Key Attributes are missing some fundamental elements or that any one of the Key Attributes is not complete. To the extent that the FSB Key Attributes have shortcomings, our study falls short.

IV. Variations Between EU Legal Framework of Bank Resolution and FSB Key Attributes

Part 1. Sources of Variation

Variations between the FSB Key Attributes and the BRRD may be attributed to the following five factors: (1) the scope of the BRRD; (2) the open-ended language of the FSB Key Attributes; (3) the fact that certain aspects of bank resolution are not explicitly dealt with in the FSB Key

Attributes; (4) the global orientation of the FSB Key Attributes compared with the European focus of the BRRD; and (5) the fact that the FSB Key Attributes and the BRRD serve different purposes—while the FSB Key Attributes were designed to lay out best standards of practice in bank recovery and resolution, the BRRD serves to attain an adequate level of harmonization of bank resolution in the EU (including the Banking Union), mirroring, where practicable, the FSB standards.

Variation is expected between the BRRD and national resolution frameworks due to inter alia: (1) the scope of application of the Directive; (2) the distinction between systemic and less-systemic banks for the purposes of allocating responsibilities between the SRB and the national resolution authorities in the SRM; (3) the complementarity of the BRRD with legal frameworks whose harmonization is limited; and (4) the provision of national options and discretions in the BRRD.⁷ These variations raise potential concerns with regard to the effective implementation of the FSB Key Attributes in the EU. For example, some BRRD rules provide for discretion or variation in implementation while, at the same time, describing a uniform set of legal principles that national resolution authorities must take into account. These legal principles—descriptions of criteria, conditions, or circumstances—nevertheless guide evaluative judgments and confine the range of available options for national resolution authorities. EBA technical and implementing standards and EBA guidelines also impact how far national resolution authorities can go in exercising discretion. Taken together, they provide some constraints on Member States and national resolution authorities’ use of discretion.⁸

Furthermore, there are several issues about which the FSB Key Attributes are open-ended or silent. For example, the FSB Key Attributes do not specify who is to make determinations with regard to events that may trigger entry into resolution. BRRD Article 32(2) states that such determinations are to be made either by the competent authority (typically the supervisory authority) or by the resolution authority after consulting with the competent authority. In view of this, the analysis below focuses on variations that, in our opinion, are liable to raise concerns with regard to the effective implementation of the FSB Key Attributes in the EU at the regional level.

⁷ For a comprehensive overview of national options provided in the BRRD, see Linter (2015).

⁸ The EBA monitors consistency, although how far the EBA can actually go in enforcing convergence is an open question. The EBA is responsible for the consistent application of the Rulebook in all 28 Member States including those participating in the Banking Union. To this end, Article 17 of EBA Regulation endows the EBA with quasi-investigatory and enforcement powers. Contrary to the EBA, the SRB is also empowered to impose direct sanctions, albeit in very limited circumstances. For a more detailed discussion, see Georgosouli (2016).

Part 2. Variations Between FSB Key Attributes and the BRRD

(a) Implementation of KA 1 (scope)

Key Attribute 1 outlines the required scope, or expanse, of an effective resolution regime. The BRRD fully adheres to 4 of the 7 elements of Key Attribute 1 and partially adheres to 2 of the elements, leading to a BRRD consistency score of 0.56. This score was lowered by the BRRD's narrow focus on credit institutions and certain investment firms. In particular, Key Attribute 1 states that Financial Market Infrastructures (FMIs) should be subject to the resolution regime, but the BRRD does not apply to FMIs, which led to a score of 0 for that component of Key Attribute 1. The legal text of the BRRD also does not make reference to "non-regulated entities within a financial group or conglomerate," which the Key Attributes state should be included. Lastly, according to the Key Attributes, all domestically incorporated Global Systemically Important Financial Institutions (G-SIFIs) should be subject to institution-specific cross-border cooperation agreements as further outlined in Key Attribute 9. As we discuss in more detail below, although bank resolution is expected to be "institution-specific" where appropriate, it is not legally mandatory under the BRRD to enter into institution-specific cross-border cooperation agreements.

(b) Implementation of KA 2 (designation of resolution authority)

Key Attribute 2 requires a resolution authority and outlines the objectives and boundaries of the resolution authority(ies). The BRRD fully adheres to 8 of the 11 elements of Key Attribute 2 and partially adheres to the remaining 3 elements which yields an overall Key Attribute 2 score of 0.81, higher than Key Attribute 1. Key Attribute 2 does not recommend a specific institutional design for the resolution authority. Rather, countries are free to choose their preferred level of institutional integration when designating a single resolution authority or establishing multiple resolution authorities. However, in the case of a multi-tiered structure, the respective mandates, roles, and responsibilities of the resolution authorities must be clearly defined and be consistent with all other recommendations of the FSB. The FSB's approach to the institutional design of resolution authorities accepts that the institutional features of resolution authorities are bound to be context-dependent. The BRRD, however, introduces a slight deviation from Key Attribute 2,

leading to this component scoring a 0.5 instead of a 1, insofar as the letter of the Directive conveys a clear preference for a single resolution authority subject to exceptions.⁹

BRRD Article 3(12) also makes a special provision for the legal protection of resolution authorities and their respective staff.¹⁰ But while the Key Attributes require that “the resolution authority and its staff should be protected against liability for actions taken and omissions made while discharging their duties in the exercise of resolution powers in good faith,” the BRRD only states that “Member States may limit the liability of the resolution authority ... in accordance with national law for acts and omissions in the course of discharging their functions under this Directive.” The permissiveness of the BRRD language relative to the Key Attributes led to this component receiving a score of 0.5.

Finally, Key Attribute 2 states that resolution authorities “should have unimpeded access to firms ... for the purposes of resolution planning and the preparation and implementation of resolution measures.” Although the BRRD does not use the phrase “unimpeded access to firms,” it does mandate that Member States shall make sure that resolution authorities have the powers to require the provision of “all of the information necessary” to draw up and implement resolution plans and that resolution authorities can request information from the bank either directly or through “the competent authority” (e.g., prudential supervisor in the case of a bank). We interpret Key Attribute 2 to favour direct access to information, so asking a resolution authority to obtain information through a competent authority can be seen as an unnecessary procedural formality that can potentially be obstructive to the timely planning, preparation, and implementation of the resolution. For this reason, we scored this component of Key Attribute 2 at 0.5.

⁹ Specifically, BRRD Article 3(1) requires Member States “to designate one or, exceptionally, more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers.” Under the BRRD, it is legally mandatory for Member States to ensure that resolution authorities are “public administrative authorities” or “authorities entrusted with public administrative tasks.”⁹ While the BRRD does not impose a specifically detailed design of the national resolution authority as this would interfere with the constitutional and administrative systems of Member States, the BRRD does mandate operational independence and mechanisms to be in place for the management of conflicts of interest. This is consistent with KA 2, although KA 2.5 seems to suggest that the relevant provisions of the BRRD should have been more detailed in describing the institutional features of national resolution authorities.

¹⁰ Resolution authorities and staff are not immune from judicial review. Any limitations to liability come without prejudice to the right to appeal against a decision on crisis prevention and management. The lodge of judicial review does not automatically suspend the effect of the challenged decision. See BRRD Article 3(12) and BRRD Article 85(2)-(3).

(c) Implementation of KA 3 (resolution powers)

Key Attribute 3 denotes the powers of the resolution authority described in Key Attribute 2. The BRRD fully adheres to 27 of the 32 elements of Key Attribute 3 and partially adheres to another 2 elements. We score BRRD's consistency with Key Attribute 3 at 0.88.

Key Attribute 3 offers a detailed description of the general resolution powers. One such power is that resolution authorities should have the power to “remove and replace the senior management and directors and recover monies from responsible persons, including claw-back of variable remuneration.” Under the BRRD, resolution authorities are empowered to remove or replace the management body and senior management of an institution under resolution. However, the BRRD does not specify whether this power also includes the power to recover (claw back) variable remunerations that open the door to discretion across Member States and led to a score of 0.5 for this component of Key Attribute 3.

Key Attribute 3 also gives resolution authorities the power to “impose a moratorium with a suspension of payments to unsecured creditors and customers (except for payments and property transfers to central counterparties (CCPs) and those entered into payment, clearing and settlement systems) and a stay on creditor actions to attach assets or otherwise collect money or property from the firm, while protecting the enforcement of eligible netting and collateral agreements.” However, BRRD Article 69 does not make explicit reference to the power to impose a temporary moratorium on the payment of claims.¹¹ It does, however, equip resolution authorities with the power to “suspend certain obligations.” The current moratorium tools in the BRRD do not provide as much [power] to the authorities as the Key Attribute and also allow scope for differing treatment of institutions in early intervention and therefore uncertainty, which led to a score of 0.5 for this component of Key Attribute 3. Note that the European Commission is reviewing modifications to the moratorium.

The remaining deviations from Key Attribute 3 in the BRRD are related to limitations to the scope of the BRRD. In particular, several elements of Key Attribute 3 related to the resolution of insurance companies were scored a 0. As most of the impact of the overall score came from issues

¹¹ However, see Recital 89 of the preamble to the BRRD, which states that resolution authorities should have ‘the power to impose temporary moratorium on the payment of claims.’

outside of the scope of the BRRD, we view the BRRD to be nearly compliant with Key Attribute 3.

(d) Implementation of KA 4 (set-off, netting, collateralization, segregation of client assets)

Key Attribute 4 outlines the framework governing set-off rights, contractual netting and collateralization agreements, and the segregation of client assets in case of a resolution. The BRRD fully adheres to 2 of the 6 elements and partially adheres to the remaining elements for a score of 0.75 on this Key Attribute.

The deductions in this Key Attribute are largely due to linguistic differences between the two texts rather than pure omissions. For example, with respect to contractual acceleration or early termination rights, Key Attribute 4 equips resolution authorities with the power “to stay temporarily such rights.” Key Attribute 4 further specifies that the stay may be automatic or subject to the discretion of the resolution authority and that in either case, countries should ensure that there is clarity as to the beginning and the end of the stay. While BRRD Article 71 is broadly in line with this part of the Key Attribute, paragraph 3 of Article 71 reads: “Any suspension under paragraph 1 or 2 shall not apply to systems or operators of systems designated for the purposes of the Directive 98/26/EC, central counterparties or central banks.”

Paragraphs 4 and 5 of Article 71 also provide an exception where a person may exercise a termination right under a contract before the end of the suspension period if that person receives notice from the resolution authority that the rights and liabilities covered by the contract shall not be transferred to another entity or shall not be subject to write-down or conversion on the application of the bail-in tool. The introduction of this exception may have some unintended consequences in practice. Specifically, it raises the question as to the exact point of time when there is a legal obligation for the resolution authority to communicate its intention (e.g., the intention to transfer or not to transfer certain rights and liabilities), and it suggests that this point of time may well be in advance of exercising the power of temporary suspension. This procedural ambiguity could provide grounds for the judicial review of decisions taken by the resolution authorities. We therefore assign a score of 0.5 for several components of this Key Attribute, which gives a final Key Attribute 4 score of 0.75.

(e) Implementation of KA 5 (safeguards)

According to our analysis, the BRRD fully adheres to all 6 elements of Key Attribute 5 and thus scores a 1.00 overall.

(f) Implementation of KA 6 (funding of firms in resolution)

Key Attribute 6 lays out the policies and institutions that should be in place to ensure proper funding of a firm in resolution. There is broad consistency between the BRRD and the 6 elements of Key Attribute 6, with two notable exceptions. The first is that the BRRD regulates the provision of public funding *outside* resolution, the second is that the BRRD does not explicitly allow recovery of losses outside reasonable expenses. This yields an overall score of 0.8 for Key Attribute 6.

In addition to the provision of public funding in resolution, the BRRD regulates the provision of public funding outside resolution, while Key Attribute 6 is silent on the topic. Specifically, precautionary recapitalisation may be allowed under the BRRD where a solvent bank fails to raise capital privately following a stress test due to a temporary liquidity shortage and its failure would be a risk to financial stability. Public financial support outside resolution can take various forms (e.g., a State guarantee to back liquidity facilities provided by central banks) and is seen as a temporary measure. It is conditional on final approval under the EU State aid framework. Moreover, the term “precautionary” denotes the forward-looking nature of the measure and implies that it is not to be used to offset losses that the troubled financial firm has incurred or is likely to incur in the near future.¹²

Where resolution authorities are equipped with the power to place a distressed bank under temporary public ownership and control, Key Attribute 6 provides that there should be a provision to recover any losses incurred by the state. These losses are to be recovered “from unsecured creditors or, if necessary, the financial system more widely.” According to BRRD Article 37(7), a national resolution authority (and any financial arrangement acting pursuant to Article 101 of the BRRD) is entitled to recover reasonable expenses in one or more of the following ways:

¹² For a more detailed discussion, see: Olivares-Caminal and Russo (2017) and Georgosouli (2018).

- (a) as a deduction from any consideration paid by a recipient to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;
- (b) from the institution under resolution, as a preferred creditor;
- (c) from any proceeds generated as a result of the termination of the operation of the bridge institution or the asset management vehicle, as a preferred creditor.¹³

But the lack of explicit reference to any entitlement to “recover losses” more generally suggests departure from Key Attribute 6 as long as the Key Attributes’ reference to “losses” can be interpreted as covering other losses in addition to losses incurred out of “reasonable expenses.” We therefore scored this component of Key Attribute 6 a 0.5 for an overall score of 0.8 for the Key Attribute as a whole.

(g) Implementation of KA 7 (legal framework conditions of cross-border cooperation)

Key Attribute 7 sets out the legal framework conditions for cross-border cooperation. The BRRD broadly adheres to Key Attribute 7, with an overall score of 0.93. The BRRD fully adheres to 6 of the 7 elements of Key Attribute 7 and partially adheres to the remaining element.

The main deviation between Key Attribute 7 and the BRRD relates to whether national laws and regulations discriminate against creditors on the basis of their nationality, the location of their claim, or the jurisdiction where it is payable, which, according to Key Attribute 7, it should. Recital (13) of the Preamble to the BRRD clearly communicates the commitment of the EU legislator that, with regard to treatment and ranking of claims in insolvency, creditors are not discriminated against on the basis of their nationality. In this spirit, BRRD Article 108 harmonizes the ranking of deposits in insolvency hierarchy to preempt instances of undue discrimination. The FSB refers to “creditors” in general, including, but not limited to, the group of creditors specified in Article 108 (e.g., secured depositors). The minimum harmonization of the protection of creditors attained in BRRD falls somewhat short of the level of harmonization contained in Key Attribute 7, and we thus score this component of Key Attribute 7 a 0.5. Key Attribute 7 further recommends that the treatment of creditors and ranking in insolvency is transparent and properly disclosed to depositors, insurance policyholders, and other creditors. The November 2016

¹³ This relates to expenses in connection to the use of any resolutions or powers or government stabilization tools. The same holds for resolution authorities.

legislative proposal amending the BRRD would address the harmonization of creditor hierarchy by introducing a new statutory category of non-preferred senior debt.

(h) Implementation of KA 8 (crisis management groups) and KA 9 (institution-specific cross-border cooperation agreements)

In view of the pivotal role that Crisis Management Groups (CMGs) could play in cross-border resolution, consistency between the BRRD and Key Attribute 8 is discussed jointly with Key Attribute 9 (institution-specific cross-border cooperation agreements). While there is some consistency with Key Attribute 8—the BRRD only partially adheres to 2 of the 4 elements of Key Attribute 8—consistency with Key Attribute 9 is higher—the BRRD fully adheres to 6 of the 11 elements of Key Attribute 9 and partially adheres to the remaining elements, suggesting that the BRRD enables credible cross-border cooperation among resolution authorities.

According to Key Attribute 8, CMGs should keep under active review and report as appropriate to the FSB and the FSB Peer Review Council on a number of critical elements.¹⁴ But BRRD Article 97(5) only states that “Cooperation arrangements concluded between resolution authorities of Member States and third countries in accordance with this Article may include provisions on the following matters: [...] (f) procedures and arrangements for the exchange of information and cooperation under points (a) to (e), including, where appropriate, through the establishment and operation of crisis management groups.” From this provision, it follows that the BRRD acknowledges the role of CMGs in the resolution of G-SIFIs, but it does not specify the tasks and role of the CMGs. Rather, it is understood that, in due course, international agreements will set out details of the operation of CMGs. Pending the conclusion of these international agreements, European Resolution Colleges are expected to function like CMGs.¹⁵ The BRRD does not impose any reporting requirements to the FSB and the FSB Peer Review Council (FSB Resolvability Assessment Process for the time being), however, and thus the scores for all of the components of Key Attribute 8 were lowered, providing an overall score of 0.33.

¹⁴ These elements include (i) progress in coordination and information sharing with the CMGs and with host authorities that are not represented in the CMGs, (ii) the recovery and resolution planning process for G-SIFIs under institution-specific cooperation agreements, and (iii) the resolvability of G-SIFIs.

¹⁵ The BRRD draws a distinction between the resolution colleges of Article 88, which facilitate the cross-border resolution of groups in the EU, and the resolution colleges named as “European Resolution Colleges” of Article 89, which are formed in order to facilitate the cross-border resolution of subsidiaries and branches of third-country financial institutions that are considered of systemic significance in more than one Member State.

Key Attribute 9 stipulates that these cooperation agreements should, for example, “establish the objectives and processes for cooperation through CMGs,” but, as discussed above, the BRRD does not specify the tasks and role of the CMGs; thus, this component of Key Attribute 9 was scored a 0.5. But more broadly, BRRD Article 97(3) stipulates that the EBA may conclude “non-binding framework cooperation arrangements” with third countries.

The BRRD is generally in line with Key Attribute 9, with a score of 0.88. However, the soft law nature of the arrangements pending the conclusion of legally binding international agreements creates uncertainty. The BRRD regulates the content of the agreement with third countries and the content of the non-binding cooperation arrangements only in broad terms, leaving the details to be decided on an ad hoc basis and potentially in a manner that may not align to the recommendations of the FSB. For example, BRRD Article 97(3) mandates that the content of non-binding cooperation arrangements shall establish processes and arrangements for inter alia information sharing and cooperation. In a similar fashion, the Directive sets out a non-exhaustive list of tasks and powers, but, at the same time, it states that the cooperation framework can include some or all of those tasks and powers in the list. As such, several other components of Key Attribute 9 have also been scored a 0.5, as the BRRD does not provide specific guidance for each specific condition of Key Attribute 9.

(i) Implementation of KA 10 (resolvability assessments)

According to our analysis, the BRRD fully adheres to the 8 elements of Key Attribute 10 and thus scores a 1.00 overall.

(j) Implementation of KA 11 (recovery and resolution planning)

Key Attribute 11 governs processes with regard to recovery and resolution planning. The BRRD adheres closely to Key Attribute 11 with an overall score of 0.88. The BRRD fully adheres to 14 of the 19 elements of Key Attribute 11 and partially adheres to 3 more elements.

Broadly speaking, Key Attribute 10 (resolvability assessments), Key Attribute 11 (recovery and resolution planning), and certain aspects of Key Attribute 3 (resolution powers) are mirrored in

the early intervention rules provided in the BRRD.¹⁶ The BRRD's rules on preparation and early intervention leave considerable discretion to national resolution authorities subject to EBA regulatory technical standards, implementation standards, and guidelines. For example, resolution authorities determine the contents and details of recovery and resolution plans, the date by which the first recovery and resolution plans are to be drawn up, and the frequency for updating them.¹⁷

With regard to the content of the resolution plan, Key Attribute 11 recommends *inter alia* that the resolution plan must include a substantive resolution strategy and an operational plan for its implementation and identification.¹⁸ BRRD Article 10(7) is broadly in compliance with KA 11.6; however, there are some notable points of deviation. For example, Article 10(7) (j) prescribes that a resolution plan must contain a detailed description of the different resolution strategies that could be applied according to the different possible scenarios and the applicable timescales. However, it makes no explicit reference to (a) “actions to protect insured depositors and insurance policyholders” or (b) actions that “ensure the rapid return of segregated client access,” leading us to score these components of Key Attribute 11 as 0.5. It also does not provide for “options or principles for the exit from the resolution process,” which we therefore score as 0.

Key Attribute 11 additionally requires regular updates and reviews of recovery and resolution plans. In particular, recovery and resolution plans must be updated at least annually or when material changes to a firm's business or structure and, in the case of G-SIFIs, be subject to regular reviews within the firm's CMGs. Key Attribute 11 further recommends that, with respect to G-SIFIs, the review should involve the firm's CEO. BRRD Article 5(2) (recovery plans) and BRRD Article 10(6) (resolution plans) comply with these recommendations. With regard to the resolution of G-SIFIs, the BRRD adheres to the FSB standards, albeit subject to the observations made above with respect to the implementation of KA 8 (CMGs). A further point of deviation concerns the involvement of the CEOs of G-SIFIs. Arguably, this may be inferred in the case of resolution plans.¹⁹ However, it is far less evident in the case of recovery plans.

¹⁶ For example, one of the early intervention powers provided in the BRRD is the appointment of a temporary administrator. The purpose of this appointment is to restore the viability of the distressed bank—namely, it is a recovery measure. The FSB classifies this as a ‘general resolution power(s)’ (KA 3.2. (ii)).

¹⁷ BRRD Article 5.

¹⁸ According to Key Attribute 11, the resolution plans must include “(i) financial and economic functions for which continuity is critical; (ii) suitable resolution options to preserve those functions or wind them down in an orderly manner; (iii) data requirements on the firm's business operations, structures, and systemically important functions; (iv) potential barriers to effective resolution and actions to mitigate those barriers; (v) actions to protect insured depositors and insurance policyholders and ensure the rapid return of segregated client assets; and (vi) clear options or principles for the exit from the resolution process.”

¹⁹ With regard to the review and updates of resolution plans, see BRRD Article 10 (7) (r), according to which the resolution plan must, where applicable, include ‘any opinion expressed by the institution in relation to the resolution plan.’

(k) Implementation of KA 12 (access to information and information sharing)

Key Attribute 12 aims to ensure seamless information sharing between supervisory authorities, central banks, resolution authorities, finance ministries, and the public authorities responsible for guarantee schemes. The BRRD adheres closely to Key Attribute 12 with an overall score of 0.92. The deviation of 1 of the 7 total elements of Key Attribute 12 is due to some degree of ambiguity in the BRRD with regard to the procedures for sharing information in the institution-specific cooperation agreements. This ambiguity led us to score this one component of Key Attribute 12 a 0.5.

Part 3. The Single Resolution Mechanism Regulation and its Impact on the Findings of the Consistency Index

Alone, the BRRD provides a partially harmonized legal framework for the recovery and resolution of banks and certain investment firms, but, as detailed above, it leaves ample discretion to national resolution authorities, especially in the application of the tools and in the use of national financing arrangements. Consequently, neither the risk of taking separate and inconsistent decisions is avoided nor the dependence of banks on the support of national financing arrangements is sufficiently reduced. Within the Banking Union, these risks are, in part, mitigated with the SRM Regulation. The SRM Regulation provides the legal framework for the operation of the SRM, which is expected to enhance legal uniformity and consistency in the application of the resolution rules of the BRRD in participating Eurozone countries (Georgosouli 2016, 354-355).

The SRM applies only with respect to banks whose home supervisor is the ECB either by virtue of being in the euro area or by opting into supervision by the ECB. The SRB is an EU-level agency with a special resolution mandate.²⁰ National resolution authorities are also involved in bank resolution; however, their involvement is much more pronounced in the resolution of “less systemic banks.” The latter are typically small- and medium-sized banks of domestic interest. The SRM Regulation also makes provision for a Single Resolution Fund (SRF), which will eventually replace the existing national resolution funds and be administered by the SRB.²¹

²⁰ The SRB is an EU agency with a special resolution mandate for the purposes of the SRM. See SRM Regulation Article 42(1).

²¹ The SRM Regulation and the BRRD set out rules for the use of the SRF as well as general criteria to determine ex-post and ex-ante contributions. An Inter-Governmental Agreement specifies the conditions upon which participating Member States agree to transfer the contributions that they raise at the national level to the SRF and to progressively merge the national compartments. See SRM Regulation Article 67 (general provisions), 68 (requirement to establish resolution financing arrangements), Article 69

According to the findings of this study, the entry into force of the SRM Regulation has no (or negligible) impact on the level of regional consistency with regard to KA 1 (scope), KA 4 (set-off, netting, collateralization, and segregation of client assets), KA 5 (safeguards), KA 6 (funding of firms in resolution), KA 10 (resolvability assessments), and KA 11 (recovery and resolution planning).

By contrast, it enhances the scoring of Eurozone consistency with regard to the implementation of KA 2 (designation of resolution authority), KA 3 (resolution powers), KA 7 (legal framework conditions for cross-border cooperation), KA 8 (CMGs), KA 9 (institution-specific cooperation agreements), and KA 12 (access to information and information sharing). More detail on the specific manner in which the SRM Regulation enhances consistency may be found in Annex C.

Part 4. The Transposition of the BRRD in the National Law of Member States: The Case of Germany, the United Kingdom, Greece, and Italy

Below, we examine four countries (Germany, Italy, the United Kingdom, and Greece) to assess the convergence of domestic law with the BRRD. All four countries had in place a legal framework on bank resolution prior to the transposition of the BRRD. Germany, Greece, and Italy are participating Member States in the Banking Union; the United Kingdom is not. This section does not offer an extensive overview of the domestic law on bank resolution of those countries. Instead, it offers a preliminary assessment of the actual level of convergence, highlighting key points of departure where relevant.

(a) Germany

As a Eurozone country, Germany participates in the Banking Union and the SRM. Germany adopted the BRRD Implementation Act (BRRD–*Umsetzungsgesetz*) (the Act) in December 2014.

(target level), Article 70 (ex-ante contributions), Article 71 (extra ordinary ex-post contributions), Article 72 (voluntary borrowing between resolution financing arrangements), Article 73 (alternative funding means), Article 74 (access to financial stability), Article 75 (administration of the fund), Article 76 (mission of the fund), Article 77 (use of the fund), Article 78 (mutualization of national financial arrangements in the case of group resolution involving institutions in non-participating Member States), and Article 79 (use of deposit guarantee schemes in the context of resolution). The establishment of resolution financing arrangements at the Member State level is set out in Article 99 to 109 of the BRRD. On the content of the Inter-Governmental Agreement, see European Commission, ‘A Single Resolution Mechanism for the Banking Union – frequently asked questions’ Memo 14/295 (Brussels, 15, April 2014).

In late September, the German Parliament made a number of revisions to the Act. Germany was the first EU country to transpose the BRRD into national law and covers credit institutions and investment firms in Germany. This also includes German credit institutions and investment firms that are part of a group. The Act entered into force on January 1, 2015, and amended a number of statutes, including the German Banking Act, the Restructuring Fund Act, the Covered Bond Act, the Financial Stabilization Fund Act, the Credit Institutions Reorganization Act, and the Financial Market Stabilization Fund Regulation. Importantly, it also created the Resolution and Recovery Act (*Sanierungs und Abwicklungsgesetz* (SAG)).

The SAG governs the recovery and resolution of credit institutions and investment firms in Germany and includes sections on recovery planning, early intervention measures, resolution powers and instruments, restructuring plans, and the utilization of deposit guarantee schemes. The Act also established the *Bundesanstalt für Finanzmarktstabilisierung* (FMSA) as the resolution authority and *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) or the ECB, where appropriate, as the competent supervisory authority. The FMSA was originally established in 2008, and in 2015, the FMSA gained additional competencies, including the responsibility of being the national resolution authority.²² The Act concentrates the powers of resolution that had been previously distributed among a number of agencies in the FMSA.

Although the German law is generally consistent with the content of the BRRD, we list two items that could pose some discontinuity in the future if they are not adequately remedied or addressed: (a) the organizational structure of the combined FMSA/BaFin agency, and (b) early intervention measures and sub-delegation of relevant powers. Specifically, the Act stipulates that, at some later date, the FMSA would be folded into the BaFin. The Act further states that there would be a clear organizational divide between the resolution authority and the supervisory tasks of the BaFin but was not explicit about how that division would be accomplished. Commentary by the ECB notes that “it is important to ensure operational independence of the resolution function and to avoid conflicts of interest between the resolution function and other functions” (European Central Bank, 2014).²³ With regard to early intervention measures, section 36(4) of the Act grants the Ministry of Finance the power to specify certain conditions that could trigger early intervention measures and allows the Ministry of Finance to transfer that power. The ECB notes that this delegation of

²² Draft BRRD implementation Act, page 2.

²³ Opinion of the European Central Bank on 12 September 2014 on the implementation of the European Bank Recovery and Directive (CON/2014/67).

power “seems inappropriate given that the intervention powers lie with the supervisory authority, which would therefore appear best placed to specify the relevant trigger conditions.”

To bring domestic German law in line with the “no creditor worse off” principle of the BRRD, the German Resolution Mechanism Act (*Abwicklungsmechanismusgesetz – AbwMechG*) changed the ranking of liabilities in the case of bank insolvency proceedings by amending section 46(f) of the German Banking Act (KWG).²⁴

(b) Italy

The Italian government passed two legislative decrees in 2015 to transpose the BRRD into domestic law.²⁵ In particular, Legislative Decree No 180 of November 16, 2015, contains the core BRRD framework. It identifies the Bank of Italy as the national resolution authority with powers to adopt regulatory measures. It sets out rules with regard to the preparation of resolution plans, resolution powers and tools, the crisis management of cross-border groups, and other matters. In addition, it establishes a national resolution fund (*Fondo di Risoluzione Nazionale*) funded by the Italian banking sector and functioning under the management of the Bank of Italy.

Legislative Decree No 181 of December 16, 2015, supplementary to Legislative Decree 180, introduces amendments to the then-existing Italian Banking Law²⁶ and to the Italian Financial Law²⁷ pertaining to several aspects including but not limited to recovery plans, intra-group financial support, and early intervention measures and the hierarchy of creditors in the so-called extraordinary administration and compulsory administrative liquidation to bring the Italian law in line with the relevant provisions of the BRRD. To ensure consistency with the scope of application of the BRRD, Legislative Decree 181 also regulates the recovery and resolution of certain investment firms. The Legislative Decrees entered into force on 1 January 2015, and the bail-in rules entered into force on 1 January 2016. The Italian legislation is broadly in line with the BRRD; however, there are some notable deviations.

²⁴ Federal Financial Supervisory Authority, ‘Bank resolution: Seniority of liabilities not eligible for bail-in makes insolvency proceedings easier’ (Expert Articles, 29/01/2016).

²⁵ Legislative Decree 180 (16 November 2015) and Legislative Decree 181 (16 November 2015). Both Decrees were published in the Italian Official Gazette on 16 December 2015 and entered into force on the same date subject to certain exceptions, chief among which are the rules on bail-in. The later entered into force on 1 January 2016.

²⁶ Legislative Decree No 385 of 1 September 1993.

²⁷ Legislative Decree No 58 of 24 February 1998.

The National Resolution Unit was established within the Bank of Italy to facilitate the functions of the Bank of Italy as the designated national resolution authority.²⁸ “In order to ensure operational independence and to avoid conflicts of interest between the resolution and supervision functions, the new unit reports directly to the Governing Board of the Bank of Italy.” This is in line with BRRD Article 3(3); however, before placing an institution into resolution, the Bank of Italy must seek and obtain the prior approval from the Italian Ministry of Finance. As long as the proposed resolution measures are not expected to have a direct fiscal impact or systemic implications, the approval of the Ministry of Finance is problematic because it renders in effect the Ministry of Finance as a second national resolution authority alongside the Bank of Italy.²⁹

In relation to the bail-in tool and the hierarchy of claims, Italian law provides for an extended depositor preference regime that, as of 1 January 2019, will also cover large enterprises holding uninsured deposits.³⁰ This goes beyond what is strictly required by the BRRD and it may be justified as a measure that purports to contain the negative repercussions of a future haircut of deposits on the real economy.³¹

The Bank of Italy acting in its capacity as the national resolution authority may derogate from the *pari passu* principle and, hence, discriminate among creditors belonging to the same class—for example, in order to protect the interests of retail bondholders. The possibility of exercising this discretion is of immense practical importance in Italy because, historically, bonds issued by Italian banks have been perceived as saving products as much as investment products, and they have been massively sold to retail investors. Legislative Decree 180 allows this sort of derogation only exceptionally and only in those circumstances specified in the BRRD.

Recent experience with the handling of failing banks in Italy suggest that the protection of household bondholders is a major concern (Merler 2017). So far, the approach of the Italian authorities seems to be to avoid bail-in as much as possible. For example, the Italian authorities did not apply bank resolution law to deal with the failings of Banca Popolare di Vicenza and of Veneto Banca. Instead, they put them into administrative liquidation according to domestic Italian

²⁸ Article 3 of Legislative Decree No 72 (12 May 2015) and Article 8 of Law No. 114 of July 2015 (Legge di delegazione europea 2014).

²⁹ See ECB Opinion of October 16, 2015 on the recovery and resolution of credit institutions and investment firms, CON 2015/35, Italy; (16 October 2015). The involvement of the Ministry of Finance under Greek law also raises similar concerns.

³⁰ Article 3(9) of Legislative Decree 181. For a brief commentary, see C. Di Falco, L. Prosperetti, G. Scassellati Sforzolini, ‘Implementation and first application of BRRD in Italy, (Clearly Gottlieb Steen and Hamilton LLP, Alert Memorandum; December 2015) on page 4; P. Alexander, I. Canino, F. Foscari, L. Graffi, M. Immordino, N. Lasagna and P. Leocani, ‘Italy implements the Bank Recovery and Resolution Directive’ (White and Case, Client Alert; 4 February 2016) on page 5.

³¹ See ‘The implementation of the Bank Recovery and Resolution Directive in Italy’ (Allen & Overy; 1 October 2015).

insolvency law. Another creative solution to avoid using the bail-in tool, which benefits Italian bondholders, was the creation of the Atlas fund. Atlas is financed by Italian banks and serves as a guarantee scheme for nonperforming loans (Giudici, P. and Parisi, L. 2016). The treatment of the troubled Italian bank Monte dei Paschi di Siena also reveals disagreement as to the circumstances under which extra ordinary public support, i.e. a precautionary recapitalization, may be made available.³²

(c) United Kingdom

The current U.K. legal framework for the recovery and resolution of banks dates back to 2009.³³ It was one of the first measures adopted as a response to the financial crisis of 2007.³⁴ The Banking Act 2009 stands at the epicenter of this legal framework.³⁵ Since its entry into force, it has been the subject of several amendments. Arguably, the most important set of amendments to the Banking Act 2009 were introduced with the Bank Recovery and Resolution Order 2014 (SI 2014 No 3329), which is the key transposition instrument of the BRRD.³⁶ The Order introduces necessary amendments with respect to statutory objectives and resolution triggers as well as new pre-resolution powers to the U.K. resolution authorities, including the obligation to write down or convert capital instruments before using any stabilization options. The Order also amends the original bail-in powers and alters the procedural rules for the use of stabilization powers.³⁷

The Banking Act 2009 identifies the Bank of England as the leading resolution authority. The Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) are identified as the competent authorities, and Her Majesty's Treasury (HM Treasury) is named as the competent Ministry.³⁸ The Bank of England takes decisions about the use of the available recovery and

³² In the case of Monte dei Paschi di Siena, it is argued that Article 32 (4) (d) (iii) could be used for precautionary recapitalisations as a form of liquidity support to banks. On this point see, Veron (2016).

³³ The Banking (Special Provisions) Act 2008 was the first ever special insolvency regime for banks in the United Kingdom. It eventually lapsed and was replaced by the Banking Act 2009, which is still in force today in adapted form.

³⁴ With respect to the bail-in tool, it is worth noting that, at the EU level, the deadline for the transposition of the BRRD was January 2015, with the transposition of the bail-in tool delayed until 1 January 2016. The bail-in provisions of the U.K. legislation came into effect on 1 January 2015, with the exception of the provisions relating to a Minimum Requirement of Eligible Liabilities (MREL).

³⁵ For a general discussion, see. L Chan Ho, 'Bank Insolvency Law in the United Kingdom' in Lastra (2011).

³⁶ Other legal instruments transposing the BRRD include the Bank and Building Societies (Depositor Preference and Priorities) Order 2014, the Banking Act 2009 (Restriction of Special Bail-in Provision etc.) Order 2014, the Banking Act 2009 (Mandatory Compensation Arrangements Following Bail-in) Regulations 2014, the Bank Recovery and Resolution (No2) Order 2014, and the Building Societies (Bail-in) Order 2014.

³⁷ The bail-in power was introduced in the United Kingdom by Schedule 2 of the Banking Reform Act 2013. The latter entered into force on 31 December 2014.

³⁸ As per 1 March 2017, the Bank of England is to act as the PRA through the Prudential Regulation Committee under the Bank of England and Financial Services Act 2016 (Commencement No. 4 and Saving Provision) Regulations 2017.

resolution tools. It has the overall responsibility of the implementation of these decisions and, as the “resolution authority,” it is endowed with enforcement powers.³⁹ The Bank of England acts jointly with the PRA and, where relevant, the FCA. While the PRA is responsible for banks, the FCA is responsible for investment firms. The role of the PRA and the FCA is to determine whether the financial institution in question is failing or likely to fail. Where resolution measures involve the use of public funds, it is for the Treasury to take the final decision.⁴⁰

The resolution objectives of the U.K. recovery and resolution regime are in line with those laid down in the BRRD.⁴¹ However, there are some differences in the language used. The U.K. law makes explicit reference to the promotion of public confidence in the stability of the U.K. financial system. Strictly speaking, the “public confidence” objective is not included among the BRRD resolution objectives. Nevertheless, it may be inferred by the BRRD financial stability objective. The U.K. legal framework does not set out a separate set of resolution principles akin to the one in BRRD Article 34 (General Principles Governing Resolution).

The BRRD requires that Member States have in place resolution financing arrangements for the purpose of ensuring the effective application of the resolution tools and powers. The United Kingdom has not established a national resolution fund. Instead, the existing U.K. bank levy system is to be used to meet the ex-ante funding requirements of the BRRD.⁴² These funds will be made available immediately in the event of a resolution provided all other conditions are met in view of the fact that the BRRD imposes limits on the use of resolution funds to absorb losses.

The United Kingdom also intends to apply the “no creditor worse off” principle to all liabilities affected where a write-down occurs (i.e., irrespective of whether the write-down is mandatory or discretionary for the resolution authority) in accordance with section 12AA of the Banking Act

³⁹ Sections 83ZA to 83Z2 of the Banking Act. Although consistent with the BRRD, there are concerns that this adds institutional complexity, creating domestically a ‘triple-peaks’ regulatory system of recovery and resolution.

⁴⁰ For example, where the troubled financial institution is to be placed into temporary public ownership.

⁴¹ The resolution objectives are set out in section 4 of the Banking Act 2009. They are the following: (a) to ensure the continuity of banking services in the United Kingdom and of critical functions; (b) to protect and enhance the stability of the United Kingdom’s financial systems; (c) to protect and enhance public confidence in the stability of the United Kingdom’s financial systems; (d) to protect public funds, which includes reliance on extraordinary public financial support; (e) to protect investors and depositors to the extent that they have investments and deposits, which are respectively covered by an investor compensation scheme and a deposit guarantee scheme; (f) to protect client assets; and (g) to avoid interfering with property rights in contravention of the European Convention of Human Rights (within the meaning of the Human Rights Act 1998). On the right to a peaceful environment of property, see Article 1 of the First Protocol of the European Convention on Human Rights. The BRRD objectives are the following: (a) to ensure the continuity of critical functions, (b) to avoid significant adverse effects on financial stability, (c) to protect public funds, (d) to protect insured depositors, and (e) to protect client funds and client assets. These are set out in BRRD Article 31.

⁴² Schedule 19 of the Finance Act 2011.

2009 (HM Treasury 2015). The Order provides an additional layer of protection for certain liabilities that arise out of derivatives, financial contracts, and qualifying master agreements. Nevertheless, a range of claims is left out. Examples include but are not limited to liabilities in relation to an unsecured debt instrument, which is transferable in security; liabilities in relation to capital instruments; and liabilities in relation to subordinated debt (Bates 2015).

(d) Greece

As a Eurozone country, Greece participates in the Banking Union and the SRM. The BRRD was transposed into Greek law on 23 July 2015 with the passing of Law 4335/2015 (Kontizas 2015, 618). The law consists of 20 chapters that govern the recovery and resolution of all those deposit-taking institutions (banks) and investment firms that fall within the scope of the BRRD. By and large, these chapters mirror the chapters of the BRRD and cover a wide range of issues including the following: (a) recovery and resolution plans; (b) early intervention; (c) resolution objectives and tools; (d) powers of resolution agencies; (e) safeguards; (f) resolution funding; and (g) procedural matters. The same legal instrument also amends earlier Greek law with the view of harmonizing the domestic legal framework of bank recovery and resolution with the EU legal framework (Kontizas 2015, 618). An example is the introduction of certain amendments to Law 4261/14 for the purposes of determining the ranking of covered deposits. Although the Greek law is overall consistent with the content of the BRRD, we identify two issues of concern: (a) the institutional structure of bank resolution under Greek law, and (b) the need for public funding for the full protection of covered deposits.

With regard to the institutional structure, Law 4335/2015 designates the Bank of Greece and the Hellenic Capital Market Commission as the designated resolution authorities of credit institutions (“banks”) and investment firms, respectively (Kontizas 2015, 618-619). Furthermore, the law stipulates that the Hellenic Deposit and Investment Guarantee Fund (HDIGF) shall perform the functions of the national resolution fund, but with respect to the resolution of banks only. The Athens Stock Exchange Members’ Guarantee Fund is the national resolution fund for investment firms.

The resolution powers of the designated Greek resolution authority are wide in scope and fully adhere to those enshrined in the BRRD. The role of the Ministry of Finance in bank resolution is

a controversial feature of Law 4335/2015.⁴³ In exercising their powers—most notably, powers associated with the use of the bail-in tool—the Greek national resolution authority does not act independently. It co-decides jointly with the Ministry of Finance. Although the open-ended language of BRRD Article 3(6) seems to offer scope for such a form of decision-making, it allows the Ministry of Finance a third seat at the resolution table and puts into doubt the operational independence of the process.

Greek Law 4335/2015 introduces a new provision in the existing Law 4261/2014—namely, Article 145A, which harmonizes the ranking of claims along the lines of BRRD Article. New Article 145A transposes into Greek Law the distinction between the covered deposits (under the deposit guarantee schemes) and non-covered deposits of physical persons and medium- and small-sized enterprises, as this is enshrined in article BRRD 108. Article 145A(1) also stipulates that certain employment claims (notably those emanating from the provision of legal services) come first with the claims of the Greek State (where a government stabilization tool has been used) coming second. According to this ranking, covered deposits and subrogation claims of the HDGIF come third. Furthermore, the priority ranking of the first paragraph of Article 145A applies without prejudice to the second paragraph of the same article, which provides a long list of super-priority claims. Due to the prolonged crisis of the Greek economy and the vulnerability of the domestic banking sector, public funding might be required for the full protection of covered deposits.

V. Conclusion

The EU legal framework of bank resolution is flexible enough to enable implementation across the EU, and in doing so, allows scope for variation. This scope for variation may, in some cases, undermine ongoing efforts to promote global convergence with international standards of best practice in bank resolution or result in financial stability risks. In this paper, we analyze the practical implications of the flexibility of the EU legal framework of bank resolution, focusing in particular on the BRRD.

We find an aggregate BRRD score greater than 0.8, implying a large degree of consistency between the BRRD and the FSB Key Attributes. That said, preliminary findings suggest that with

⁴³ See Kontizas (2015) on page 618 (noting the role of the Ministry of Finance as one of the deviations) and 619 (noting that the ‘consent requirements for the exercise of various powers raises the question as to whether the Ministry of Finance is envisaged as a ‘de facto’ resolution authority acting in parallel to the officially designated resolution authorities in Greece namely the Bank of Greece (for banks) and the Hellenic Capital Market Commission (for investment firms)).

the exception of Key Attribute 5 (safeguards) and Key Attribute 10 (resolvability assessments), where we find the BRRD fully in line with the Key Attributes, there are several areas where the BRRD either varies from the FSB Key Attributes or allows variation at the Member State level. The majority of these variations point to slight inconsistencies with the FSB recommendations, although some variations would likely have a larger impact than others.

Three noteworthy areas of variation pertain to: (a) the scope of the BRRD compared with the recommended scope of effective resolution regimes by the FSB Key Attributes; (b) the moratorium tools in the BRRD and (c) harmonization of the protection of creditors (creditor hierarchy) in insolvency.

On (a), the scope: The BRRD covers a more narrow scope of financial institutions than the Key Attributes recommend. At present, the resolution of financial institutions other than banks and certain investment firms depends on the level of comprehensiveness of domestic legal frameworks pending progress with regard to other parallel EU initiatives to harmonize the resolution of CCPs and insolvency of firms and bring them closer to line with international standards.⁴⁴ This piece-by-piece approach to the harmonization process of financial resolution in the EU could be a financial stability concern if nonbank G-SIFIs are in need of a swift, well-coordinated, and consistent course of cross-jurisdictional action. On (b) and (c), the EU has proposed an amendment that would result in greater harmonization of the BRRD across Member States. The November 2016 legislative proposal amending the BRRD would introduce a new moratorium tool in early intervention and would modify creditor hierarchy in insolvency and create a new by creating a new class of debt instruments.

Other deviations pertain to: (a) the institutional design; (b) the lack of detail with regard to the provision, composition, role, and tasks of CMGs (Key Attributes 8 and 9); and (c) the comprehensiveness of data requirements (Key Attribute 11). There are also some other instances where the BRRD rules are closer to full consistency, but the minor deviation is deemed to have more important practical implications than the high score suggests. Despite its consistency with Key Attribute 7.5, the BRRD's mutual recognition regime, for example, is not sufficiently robust and could result in some uncertainty in cross-border resolution cases.

⁴⁴ In addition to the BRRD, one needs to note the gradual development of an EU insolvency law framework. The Winding Up Directive covers banks and certain investment firms. Insurance firms fall within the scope of the Insurers Winding Up Directive, which is recast and further amended in Title IV of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (OJ 335, 17.12.2009, p. 1).

According to our findings, the SRM Regulation does not greatly enhance consistency scoring. It does enhance the regional (Eurozone) consistency with regard to the implementation of KA 2 (designation of resolution authority), KA 3 (resolution powers), KA 7 (legal framework conditions for cross border cooperation), KA 8 (CMGs), KA 9 (institution-specific cooperation agreements), and KA 12 (access to information and information sharing), but not significantly.

On the implementation of the BRRD in Germany, Italy, the United Kingdom, and Greece, our analysis suggests near full compliance with the letter of the BRRD, although a few uncertainties (e.g., the exact scope of the “no creditor worse off” principle in the United Kingdom) and vulnerabilities (e.g., Greece) exist that may jeopardize the attainment of the resolution objectives without resorting to public funding. Additionally, the institutional structure and the concomitant question of the involvement of the national Minister of Finance on matters of bank resolution seem to cut across all four jurisdictions.

Annex A: Table that Matches the FSB Key Attributes with Corresponding BRRD Articles

KA 1: Scope

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
The resolution regime extends to any financial institution that could be systemically significant or critical if it fails including:			
(i) holding companies of a firm	1	Article 1 (1)	OJ 2014/59/EU L173/211
(ii) non-regulated operational entities within a financial group or conglomerate that are significant to the business of the group or conglomerate	0.5		
(iii) branches of foreign firms	1		
Average:	0.83		
Financial market infrastructures (“FMIs”) are subject to resolution regimes that apply the objectives and provisions of the Key Attributes in a manner as appropriate to FMIs and their critical role in financial markets. The choice of resolution powers is guided by the need to maintain continuity of critical FMI functions.	0		
The resolution regime requires that at least all domestically incorporated global SIFIs (“G-SIFIs”):			
(i) have in place a recovery and resolution plan (“RRP”), including a group resolution plan, containing all elements set out in I-Annex 4.	1	See Key Attribute 11	
(ii) are subject to regular resolvability assessments.	1	See Key Attribute 10	
(iii) are the subject of institution-specific cross-border cooperation agreements.	0.5	See Key Attribute 9	
Average:	0.83		
<u>Aggregate KA 1 Index:</u>	0.56		

KA 2: Resolution Authority

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Each jurisdiction has a designated administrative authority or authorities responsible for exercising the resolution powers over firms within the scope of the resolution regime (“resolution authority”). Where there are multiple resolution authorities within a jurisdiction their respective mandates, roles and responsibilities are clearly defined and coordinated.	1	Article 3 (1) ; Article 3(10-11)	OJ 2014/59/EU L173/219; OJ 2014/59/EU L173/220
Where different resolution authorities are in charge of resolving entities of the same group within a single jurisdiction, the resolution regime of that jurisdiction identifies a lead authority that coordinates the resolution of the legal entities within that jurisdiction.	0.5	Article 3 (1)	OJ 2014/59/EU L173/219
As part of its statutory objectives and functions, and where appropriate in coordination with other authorities, the resolution authority:			
(i) pursues financial stability and ensures continuity of systemically important financial services as well as the payment, clearing, and settlement functions	1		

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
(ii) protects, where applicable and in coordination with the relevant insurance schemes and arrangements, such depositors, insurance policyholders, and investors as are covered by such schemes and arrangements	1	Article 31	OJ 2014/59/EU L173/248
(iii) avoids unnecessary destruction of value and seeks to minimise the overall costs of resolution in home and host jurisdictions and losses to creditors, where that is consistent with the other statutory objectives	1		
(iv) duly considers the potential impact of its resolution actions on financial stability in other jurisdictions.	1		
Average:	1		
The resolution authority has the authority to enter into agreements with resolution authorities of other jurisdictions.	1	Article 93 (1)	OJ 2014/59/EU L173/318
The resolution authority has operational independence consistent with its statutory responsibilities, transparent processes, sound governance, and adequate resources and is subject to rigorous evaluation and accountability mechanisms to assess the effectiveness of any resolution measures. It has the expertise, resources, and operational capacity to implement resolution measures with respect to large and complex firms.	1	Article 3 (3, 8, 9)	OJ 2014/59/EU L173/219
The resolution authority has the expertise, resources, and operational capacity to implement resolution measures with respect to large and complex firms.	1	Article 3 (8, 9)	OJ 2014/59/EU L173/220
The resolution authority and its staff are protected against liability for actions taken and omissions made while discharging their duties in the exercise of resolution powers in good faith, including actions in support of foreign resolution proceedings.	0.5	Article 3 (12)	OJ 2014/59/EU L173/220
The resolution authority has unimpeded access to firms where that is material for the purposes of resolution planning and the preparation and implementation of resolution measures.	0.5	Article 11 (1)	OJ 2014/59/EU L173/230
<u>Aggregate KA 2 Index:</u>	0.81		

KA 3. Resolution Powers

Index Based on FSB Text	Score:	BRRD Citation	BRRD Page Number
Resolution is initiated when a firm is no longer viable or likely to be no longer viable and has no reasonable prospect of becoming so.	1	Article 32(1) a-b	OJ 2014/59/EU L173/249
The resolution regime provides for timely and early entry into resolution before a firm is balance-sheet insolvent and before all equity has been fully wiped out.	1	Article 32 (1) a-c	OJ 2014/59/EU L173/249
There are clear standards or suitable indicators of non-viability to help guide decisions on whether firms meet the conditions for entry into resolution.	1	Article 32 (4)	OJ 2014/59/EU L173/249
Average:	1		
Resolution authorities have at their disposal a broad range of resolution powers, which include powers to do the following:		Article 63 (1)	OJ 2014/59/EU L173/293
(i) Remove and replace the senior management and directors and recover monies from responsible persons, including claw-back of variable remuneration	0.5	Article 63 (1) l	OJ 2014/59/EU L173/294
(ii) Appoint an administrator to take control of and manage the affected firm with the objective of restoring the firm, or parts of its business, to ongoing and sustainable viability	1	Article 29 (1)	OJ 2014/59/EU L173/245
(iii) Operate and resolve the firm, including powers to terminate contracts, continue or assign contracts, purchase or sell assets, write down debt, and take any other action necessary to restructure or wind down the firm's operations	1	Article 63 (1) b-i	OJ 2014/59/EU L173/293

Index Based on FSB Text	Score:	BRRD Citation	BRRD Page Number
(iv) Ensure continuity of essential services and functions by requiring other companies in the same group to continue to provide essential services to the entity in resolution, any successor, or an acquiring entity; ensuring that the residual entity in resolution can temporarily provide such services to a successor or an acquiring entity; or procuring necessary services from unaffiliated third-parties	1	Article 40	OJ 2014/59/EU L173/261
(v) Override rights of shareholders of the firm in resolution, including requirements for approval by shareholders of particular transactions, in order to permit a merger, acquisition, sale of substantial business operations, recapitalization, or other measures to restructure and dispose of the firm's business or its liabilities and assets	1	Article 63 (1) b	OJ 2014/59/EU L173/293
(vi) Transfer or sell assets and liabilities, legal rights, and obligations, including deposit liabilities and ownership in shares, to a solvent third-party, notwithstanding any requirements for consent or novation that would otherwise apply (see Key Attribute 3.3)	1	Article 63 (1) c	OJ 2014/59/EU L173/293
(vii) Establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed firm (see Key Attribute 3.4)	1	Article 63 (1) d	OJ 2014/59/EU L173/293
(viii) Establish a separate asset management vehicle (for example, as a subsidiary of the distressed firm, an entity with a separate charter, or a trust or asset management company) and transfer to the vehicle for management and rundown non-performing loans or difficult-to-value assets	1	Article 63 (1) d	OJ 2014/59/EU L173/293
(ix) Carry out bail-in within resolution as a means to achieve or help achieve continuity of essential functions either by (i) recapitalising the entity hitherto providing these functions that is no longer viable or (ii) capitalising a newly established entity or bridge institution to which these functions have been transferred following closure of the non-viable firm (the residual business of which would then be wound up and the firm liquidated) (see Key Attribute 3.5)	1	Article 43 (2)	OJ 2014/59/EU L173/267
(x) Temporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of a firm into resolution or in connection with the use of resolution powers (see Key Attribute 4.3 and Annex IV)	1		
(xi) Impose a moratorium with a suspension of payments to unsecured creditors and customers (except for payments and property transfers to central counterparties (CCPs) and those entered into the payment, clearing, and settlements systems) and a stay on creditor actions to attach assets or otherwise collect money or property from the firm, while protecting the enforcement of eligible netting and collateral agreements	0.5		
(xii) Effect the closure and orderly wind-down (liquidation) of the whole or part of a failing firm with timely payout or transfer of insured deposits and prompt (for example, within seven days) access to transaction accounts and to segregated client funds)	1	Article 34 (1) h; Article 108; Article 109	OJ 2014/59/EU L173/251; OJ 2014/59/EU L173/330; OJ 2014/59/EU L173/331
Average:	0.92		
Resolution authorities have the power to transfer selected assets and liabilities of the failed firm to a third-party institution or to a newly established bridge institution.	1	Article 38 (1)	OJ 2014/59/EU L173/257
Any transfer of assets or liabilities should not require the consent of any interested party or creditor to be valid.	1	Article 38 (8,9); Article 85	OJ 2014/59/EU L173/258; OJ 2014/59/EU L173/310
Any transfer of assets or liabilities should not constitute a default or termination event in relation to any obligation relating to such assets or liabilities or under any contract to which the failed firm is a party (see Key Attribute 4.2).	1		
Average:	1		
Resolution authorities have the power to establish one or more bridge institutions to take over and continue operating certain critical functions and viable operations of a failed firm, including:			
(i) the power to enter into legally enforceable agreements by which the authority transfers, and the bridge institution receives, assets and liabilities of the failed firm as selected by the authority	1	Article 40 (1)	OJ 2014/59/EU L173/261
(ii) the power to establish the terms and conditions under which the bridge institution has the capacity to operate as a going concern, including the manner under which the bridge institution obtains capital or operational financing and other liquidity support; the prudential and other regulatory requirements that apply to the operations of the bridge institution; the selection of management and the manner by which the corporate governance of the bridge institution may be conducted; and the performance by the bridge institution of such other temporary functions as the authority may from time to time prescribe	1	Article 41 (1) a-d	OJ 2014/59/EU L173/263

Index Based on FSB Text	Score:	BRRD Citation	BRRD Page Number
(iii) the power to reverse, if necessary, asset and liability transfers to a bridge institution subject to appropriate safeguards, such as time restrictions	1	Article 40 (7)	OJ 2014/59/EU L173/261
(iv) the power to arrange the sale or wind-down of the bridge institution, or the sale of some or all of its assets and liabilities to a purchasing institution, so as best to effect the objectives of the resolution authority	1	Article 41 (8)	OJ 2014/59/EU L173/263
Average:	1		
Powers to carry out bail-in within resolution enable resolution authorities to:			
(i) write down in a manner that respects the hierarchy of claims in liquidation (see Key Attribute 5.1) equity or other instruments of ownership of the firm, unsecured and uninsured creditor claims to the extent necessary to absorb the losses	1	Article 44 (9)	OJ 2014/59/EU L173/270
(ii) convert into equity or other instruments of ownership of the firm under resolution (or any successor in resolution or the parent company within the same jurisdiction), all or parts of unsecured and uninsured creditor claims in a manner that respects the hierarchy of claims in liquidation	1	Article 48	OJ 2014/59/EU L173/279
(iii) upon entry into resolution, convert or write-down any contingent convertible or contractual bail-in instruments whose terms had not been triggered prior to entry into resolution and treat the resulting instruments in line with (i) or (ii).	1		
Average:	1		
The resolution regime makes it possible to apply bail-in within resolution in conjunction with other resolution powers (for example, removal of problem assets, replacement of senior management, and adoption of a new business plan) to ensure the viability of the firm or newly established entity following the implementation of bail-in.	1	Article 63 (1)	OJ 2014/59/EU L173/293
Average:	1		
3.7 In the case of insurance firms, resolution authorities also have the power to:			
(i) undertake a portfolio transfer moving all or part of the insurance business to another insurer without the consent of each and every policyholder	0		
(ii) discontinue the writing of new business by an insurance firm in resolution while continuing to administer existing contractual policy obligations for in-force business (run-off)	0		
Average:	0		
3.8 Resolution authorities have the legal and operational capacity to:			
(i) apply one or a combination of resolution powers, with resolution actions being either combined or applied sequentially	1	Article 72 (1-3)	OJ 2014/59/EU L173/301
(ii) apply different types of resolution powers to different parts of the firm's business (for example, retail and commercial banking, trading operations, insurance)	1		
(iii) initiate a wind-down for those operations that, in the particular circumstances, are judged by the authorities to be not critical to the financial system or the economy (see Key Attribute 3.2 xii)	1		
Average:	1		
3.9 In applying resolution powers to individual components of a financial group located in its jurisdiction, the resolution authority should take into account the impact on the group as a whole and on financial stability in other affected jurisdictions, and undertake best efforts to avoid taking actions that could reasonably be expected to trigger instability elsewhere in the group or in the financial system.	1	Article 3 (7)	OJ 2014/59/EU L173/220
Average:	1		

Index Based on FSB Text	Score:	BRRD Citation	BRRD Page Number
<u>Aggregate KA 3 Index:</u>	0.88		

4. Set-Off, Netting, Collateralization, Segregation of Client Assets

Index Based on FSB Text:	Score	BRRD Citation	BRRD Page Number
The legal framework governing set-off rights, contractual netting, and collateralization agreements and the segregation of client assets is clear, transparent, and enforceable during a crisis or resolution of firms and does not hamper the effective implementation of resolution measures.	1	Article 77	OJ 2014/59/EU L173/304
Subject to adequate safeguards, entry into resolution and the exercise of any resolution powers does not trigger statutory or contractual set-off rights, or constitute an event that entitles any counterparty of the firm in resolution to exercise contractual acceleration or early termination rights provided the substantive obligations under the contract continue to be performed.	1	Article 68	OJ 2014/59/EU L173/297
Should contractual acceleration or early termination rights nevertheless be exercisable, the resolution authority has the power to stay temporarily such rights where they arise by reason only of entry into resolution or in connection with the exercise of any resolution powers. The stay:			
(i) is strictly limited in time (for example, for a period not exceeding 2 business days)	0.5	Article 69; Article 70	OJ 2014/59/EU L173/299; OJ 2014/59/EU L173/299
(ii) is subject to adequate safeguards that protect the integrity of financial contracts and provide certainty to counterparties (see I-Annex 5 on Conditions for a temporary stay)	0.5	Article 71	OJ 2014/59/EU L173/299
(iii) does not affect the exercise of early termination rights of a counterparty against the firm being resolved in the case of any event of default not related to entry into resolution or the exercise of the relevant resolution power occurring before, during, or after the period of the stay (for example, failure to make a payment, deliver or return collateral on a due date)	0.5	Article 69; Article 70	OJ 2014/59/EU L173/299; OJ 2014/59/EU L173/299
Average:	0.5		
The jurisdiction ensures clarity both on the beginning and the end of the stay and whether the stay is discretionary (imposed by the resolution authority) or automatic in operation.	0.5		
Average:	0.5		
<u>Aggregate KA 4 Index:</u>	0.75		

5. Safeguards

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Resolution powers are exercised in a way that respects the hierarchy of claims while providing flexibility to depart from the general principle of equal (pari passu) treatment of creditors of the same class, with transparency about the reasons for such departures, if necessary to contain the potential systemic impact of a firm's failure or to maximise the value for the benefit of all creditors as a whole. In particular, equity absorbs losses first, and no loss is imposed on senior debt holders until subordinated debt (including all regulatory capital instruments) has been written-off entirely (whether or not that loss-absorption through write-down is accompanied by conversion to equity).	1	Preamble (77); Article 48 (1)	OJ 2014/59/EU L173/202; OJ 2014/59/EU L173/279

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Creditors have a right to compensation where they do not receive at a minimum what they would have received in a liquidation of the firm under the applicable insolvency regime (“no creditor worse off than in liquidation” safeguard).	1	Article 73; Article 75	OJ 2014/59/EU L173/301; OJ 2014/59/EU L173/302
Directors and officers of the firm under resolution are protected in law (for example, from lawsuits by shareholders or creditors) for actions taken when complying with decisions of the resolution authority.	1	Article 40 (12); Article 42(13)	OJ 2014/59/EU L173/263; OJ 2014/59/EU L173/266
Average:	1.00		
The resolution authority has the capacity to exercise the resolution powers with the necessary speed and flexibility, subject to constitutionally protected legal remedies and due process. In those jurisdictions where a court order is still required to apply resolution measures, resolution authorities take this into account in the resolution planning process so as to ensure that the time required for court proceedings will not compromise the effective implementation of resolution measures.	1		
The legislation establishing resolution regimes does not provide for judicial actions that could constrain the implementation of, or result in a reversal of, measures taken by resolution authorities acting within their legal powers and in good faith. Instead, it provides for redress by awarding compensation, if justified.	1		
In order to preserve market confidence, jurisdictions provide for flexibility to allow temporary exemptions from disclosure requirements or a postponement of disclosures required by the firm—for example, under market reporting, takeover provisions, and listing rules, where the disclosure by the firm could affect the successful implementation of resolution measures.	1	Article 39 (2); Article 17	OJ 2014/59/EU L173/260; EU Regulation 596/2014
Average:	1.00		
Aggregate KA 5 Index:	1.00		

6. Funding of Firms in Resolution

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Jurisdictions have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving firms.	0.5		
Where temporary sources of funding to maintain essential functions are needed to accomplish orderly resolution, the resolution authority, or authority extending the temporary funding, there is a provision to recover any losses incurred (i) from shareholders and unsecured creditors subject to the “no creditor worse off than in liquidation” safeguard or (ii) if necessary, from the financial system more widely.	1	Article 101	OJ 2014/59/EU L173/315
Jurisdiction has in place privately financed deposit insurance or resolution funds, or a funding mechanism with ex-post recovery from the industry of the costs of providing temporary financing to facilitate the resolution of the firm.	1	Article 100 (1-4)	OJ 2014/59/EU L173/270
Any provision by the authorities of temporary funding is subject to strict conditions that minimise the risk of moral hazard and include the following:			
(i) a determination that the provision of temporary funding is necessary to foster financial stability and will permit implementation of a resolution option that is best able to achieve the objectives of an orderly resolution, and that private sources of funding have been exhausted or cannot achieve these objectives	1	Article 32 (1)	OJ 2014/59/EU L173/249
(ii) the allocation of losses to equity holders and residual costs, as appropriate, to unsecured and uninsured creditors and the industry through ex-post assessments, insurance premium, or other mechanisms.	1	Article 104 (1)	OJ 2014/59/EU L173/327

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Average:	1		
As a last resort and for the overarching purpose of maintaining financial stability, some countries may decide to have a power to place the firm under temporary public ownership and control in order to continue critical operations while seeking to arrange a permanent solution such as a sale or merger with a commercial private sector purchaser. Where countries do equip themselves with such powers, there is a provision to recover any losses incurred by the state from unsecured creditors or, if necessary, the financial system more widely.	0.5	Articles 56-58	OJ 2014/59/EU L173/287
Average:	0.5		
Aggregate KA 6 Index:	0.80		

7. Legal Framework Conditions for Cross-Border Cooperation

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
The statutory mandate of a resolution authority empowers and strongly encourages the authority wherever possible to act to achieve a cooperative solution with foreign resolution authorities.	1	Article 87 a-d	OJ 2014/59/EU L173/311
Legislation and regulations in jurisdictions do not contain provisions that trigger automatic action in that jurisdiction as a result of official intervention or the initiation of resolution or insolvency proceedings in another jurisdiction, while reserving the right of discretionary national action if necessary to achieve domestic stability in the absence of effective international cooperation and information sharing. Where a resolution authority takes discretionary national action it considers the impact on financial stability in other jurisdictions.	1	Article 87 e-l	OJ 2014/59/EU L173/311
The resolution authority has resolution powers over local branches of foreign firms and the capacity to use its powers either to support a resolution carried out by a foreign home authority (for example, by ordering a transfer of property located in its jurisdiction to a bridge institution established by the foreign home authority) or, in exceptional cases, to take measures on its own initiative where the home jurisdiction is not taking action or acts in a manner that does not take sufficient account of the need to preserve the local jurisdiction's financial stability. Where a resolution authority acting as host authority takes discretionary national action, it gives prior notification and consults the foreign home authority.	1	Article 87	OJ 2014/59/EU L173/311
National laws and regulations do not discriminate against creditors on the basis of their nationality, the location of their claim, or the jurisdiction where it is payable. The treatment of creditors and ranking in insolvency is transparent and properly disclosed to depositors, insurance policyholders, and other creditors.	0.5	Preamble (13)	OJ 2014/59/EU L173/192
Jurisdiction provides for transparent and expedited processes to give effect to foreign resolution measures, either by way of a mutual recognition process or by taking measures under the domestic resolution regime that support and are consistent with the resolution measures taken by the foreign home resolution authority. Such recognition or support measures enable a foreign home resolution authority to gain rapid control over the firm (branch or shares in a subsidiary) or its assets that are located in the host jurisdiction, as appropriate, in cases where the firm is being resolved under the law of the foreign home jurisdiction. Recognition or support of foreign measures is provisional on the equitable treatment of creditors in the foreign resolution proceeding.	1	Article 90	OJ 2014/59/EU L173/315
The resolution authority has the capacity in law, subject to adequate confidentiality requirements and protections for sensitive data, to share information, including recovery and resolution plans (RRPs), pertaining to the group as a whole or to individual subsidiaries or branches, with relevant foreign authorities (for example, members of a CMG), where sharing is necessary for recovery and resolution planning or for implementing a coordinated resolution.	1	Article 98 (1-2)	OJ 2014/59/EU L173/323

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Jurisdictions provide for confidentiality requirements and statutory safeguards for the protection of information received from foreign authorities.	1	Article 84	OJ 2014/59/EU L173/308
<u>Aggregate KA 7 Index:</u>	0.93		

8. Crisis Management Groups (CMGs)

Index Based on FSB Text	Score:	BRRD Citation	BRRD Page Number
Home and key host authorities of all G-SIFIs maintain CMGs with the objective of enhancing preparedness for, and facilitating the management and resolution of, a cross-border financial crisis affecting the firm. CMGs include the supervisory authorities, central banks, resolution authorities, finance ministries, and public authorities responsible for guarantee schemes of jurisdictions that are home or host to entities of the group that are material to its resolution, and cooperate closely with authorities in other jurisdictions where firms have a systemic presence.	0.5	Article 97 (5)	OJ 2014/59/EU L173/322
CMGs keep under active review and report as appropriate to the FSB and the FSB Peer Review Council on:			
(i) progress in coordination and information sharing within the CMGs and with host authorities that are not represented in the CMGs	0		
(ii) the recovery and resolution planning process for G-SIFIs under institution-specific cooperation agreements	0.5		
(iii) the resolvability of G-SIFIs	0		
Average:	0.17		
<u>Aggregate KA 8 Index:</u>	0.33		

9. Institution-Specific Cross-Border Cooperation Agreements

Index Based on FSB Text	Score:	BRRD Citation	BRRD Page Number
For all G-SIFIs, at a minimum, institution-specific cooperation agreements are in place between the home and relevant host authorities that need to be involved in the planning and crisis resolution stages. These agreements, inter alia:			
(i) establish the objectives and processes for cooperation through CMGs	0.5	Article 97 (5)	OJ 2014/59/EU L173/322
(ii) define the roles and responsibilities of the authorities pre-crisis (that is, in the recovery and resolution planning phases) and during a crisis	1	Article 88 (1-6)	OJ 2014/59/EU L173/312
(iii) set out the process for information sharing before and during a crisis, including sharing with any host authorities that are not represented in the CMG, with clear reference to the legal basis for information sharing in the respective national laws and to the arrangements that protect the confidentiality of the shared information	1	Article 90; Article 98	OJ 2014/59/EU L173/315; OJ 2014/59/EU L173/323
(iv) set out the processes for coordination in the development of the RRP for the firm, including parent or holding company and significant subsidiaries, branches, and affiliates that are within the scope of the agreement, and for engagement with the firm as part of this process	1	Article 10 (1)	OJ 2014/59/EU L173/231
(v) set out the processes for coordination among home and host authorities in the conduct of resolvability assessments	1		OJ 2014/59/EU L173/231; OJ

Index Based on FSB Text	Score:	BRRD Citation	BRRD Page Number
		Article 15 (1-4); Article 127	2014/59/EU L173/341
(vi) include agreed-upon procedures for the home authority to inform and consult host authorities in a timely manner when there are material adverse developments affecting the firm and before taking any significant action or crisis measures	0.5	Article 90	OJ 2014/59/EU L173/315
(vii) include agreed-upon procedures for the host authority to inform and consult the home authority in a timely manner when there are material adverse developments affecting the firm and before taking any discretionary action or crisis measure	0.5		
(viii) provide an appropriate level of detail with regard to the cross-border implementation of specific resolution measures, including with respect to the use of bridge institution and bail-in powers	0.5		
(ix) provide for meetings to be held at least annually, involving top officials of the home and relevant host authorities, to review the robustness of the overall resolution strategy for G-SIFIs	0.5	Article 10 (6)	OJ 2014/59/EU L173/228
(x) provide for regular (at least annual) reviews by appropriate senior officials of the operational plans implementing the resolution strategies	1	Article 5 (2); Article 10 (6)	OJ 2014/59/EU L173/223; OJ 2014/59/EU L173/228
Average:	0.75		
The existence of agreements are made public. Note: the home authorities may publish the broad structure of the agreements, if agreed-upon by the authorities that are party to the agreement.	1	Article 88 (1) a-g; Article 26 (1)	OJ 2014/59/EU L173/312; OJ 2014/59/EU L173/244
Average:	1		
<u>Aggregate KA 9 Index:</u>	0.88		

10. Resolvability Assessments

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Resolution authorities regularly undertake, at least for G-SIFIs, resolvability assessments that evaluate the feasibility of resolution strategies and their credibility in light of the likely impact of the firm's failure on the financial system and the overall economy. Those assessments are conducted in accordance with the guidance set out in I-Annex 3.	1	Preamble (21); Article 15 (1)	OJ 2014/59/EU L173/194; OJ 2014/59/EU L173/234
In undertaking resolvability assessments, resolution authorities in coordination with other relevant authorities assess, in particular:			
(i) the extent to which critical financial services, and payment, clearing, and settlement functions can continue to be performed	1	Annex: Section C (1-28)	OJ 2014/59/EU L173/346
(ii) the nature and extent of intra-group exposures and their impact on resolution if they need to be unwound	1		
(iii) the capacity of the firm to deliver sufficiently detailed, accurate, and timely information to support resolution	1		
(iv) the robustness of cross-border cooperation and information sharing arrangements	1		
Average:	1		
Group resolvability assessments are conducted by the home authority of the G-SIFI and coordinated within the firm's CMG taking into account national assessments by host authorities.	1	Article 13 (4)	OJ 2014/59/EU L173/233

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Host resolution authorities that conduct resolvability assessments of subsidiaries located in their jurisdiction coordinate as far as possible with the home authority that conducts resolvability assessment for the group as a whole.	1	Article 13 (4)	OJ 2014/59/EU L173/233
To improve a firm's resolvability, supervisory authorities or resolution authorities have the power to require, where necessary, the adoption of appropriate measures, such as changes to a firm's business practices, structure, or organization to reduce the complexity and costliness of resolution, duly taking into account the effect on the soundness and stability of ongoing business. To enable the continued operations of systemically important functions, authorities evaluate whether to require that these functions be segregated in legally and operationally independent entities that are shielded from group problems.	1	Article 17 (4-5) a-k	OJ 2014/59/EU L173/236
<u>Aggregate KA 10 Index:</u>	1		

11. Recovery and Resolution Planning

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Jurisdictions put in place an ongoing process for recovery and resolution planning, covering at a minimum domestically incorporated firms that could be systemically significant or critical if they fail.	1	Article 4 (1-6)	OJ 2014/59/EU L173/221
Jurisdictions require that robust and credible RRP, containing the essential elements of Recovery and Resolution Plans set out in I-Annex 4, are in place for all G-SIFIs and for any other firm that its home authority assesses could have an impact on financial stability in the event of its failure.	1	Article 5 (1)	OJ 2014/59/EU L173/223
The RRP is informed by resolvability assessments (see Key Attribute 10) and takes account of the specific circumstances of the firm and reflect its nature, complexity, interconnectedness, level of substitutability, and size.	1	Article 6 (1-5)	OJ 2014/59/EU L173/224
Jurisdictions require that the firm's senior management be responsible for providing the necessary input to the resolution authorities for (i) the assessment of the recovery plans and (ii) the preparation by the resolution authority of resolution plans.	1		
Average:	1		
Supervisory and resolution authorities ensure that the firms for which a RRP is required maintain a recovery plan that identifies options to restore financial strength and viability when the firm comes under severe stress. Recovery plans include:			
(i) credible options to cope with a range of scenarios including both idiosyncratic and marketwide stress	1	Article 5 (1-10)	OJ 2014/59/EU L173/223
(ii) scenarios that address capital shortfalls and liquidity pressures	1	Annex: Section A (1-4)	OJ 2014/59/EU L173/344
(iii) processes to ensure timely implementation of recovery options in a range of stress situations	1	Article 5 (1-10)	OJ 2014/59/EU L173/223
Average:	1		
The resolution plan is intended to facilitate the effective use of resolution powers to protect systemically important functions, with the aim of making the resolution of any firm feasible without severe disruption and without exposing taxpayers to loss. It includes a substantive resolution strategy agreed to by top officials and an operational plan for its implementation and identify, in particular:			
(i) financial and economic functions for which continuity is critical	1	Article 10 (1-9)	
(ii) suitable resolution options to preserve those functions or wind them down in an orderly manner	1		
(iii) data requirements on the firm's business operations, structures, and systemically important functions	0.5		
(iv) potential barriers to effective resolution and actions to mitigate those barriers	1		

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
(v) actions to protect insured depositors and insurance policyholders and ensure the rapid return of segregated client assets	0.5		OJ 2014/59/EU L173/229
(vi) clear options or principles for the exit from the resolution process	0		
Average:	0.67		
Firms are required to ensure that key Service Level Agreements can be maintained in crisis situations and in resolution, and that the underlying contracts include provisions that prevent termination triggered by recovery or resolution events and facilitate transfer of the contract to a bridge institution or a third-party acquirer.	1	Annex: Section B (13-15); Annex: Section C (5-6, 19)	OJ 2014/59/EU L173/345; OJ 2014/59/EU L173/347
At least for G-SIFIs, the home resolution authority leads the development of the group resolution plan in coordination with all members of the firm's CMG. Host authorities that are involved in the CMG or are the authorities of jurisdictions where the firm has a systemic presence should be given access to RRP and the information and measures that would have an impact on their jurisdiction.	0		
Host resolution authorities may maintain their own resolution plans for the firm's operations in their jurisdictions, cooperating with the home authority to ensure that the plan is as consistent as possible with the group plan.	1		
Average:	0.67		
Supervisory and resolution authorities ensure that RRP are updated regularly, at least annually or when there are material changes to a firm's business or structure, and subject to regular reviews within the firm's CMG.	1	Article 5 (1-2)	OJ 2014/59/EU L173/223
The substantive resolution strategy for each G-SIFI is subject, at least annually, to a review by top officials of home and relevant host authorities and, where appropriate, the review should involve the firm's CEO. The operational plans for implementing each resolution strategy is, at least annually, reviewed by appropriate senior officials of the home and relevant host authorities.	0.5	Article 6 (1-8)	OJ 2014/59/EU L173/224
If resolution authorities are not satisfied with a firm's RRP, the authorities require appropriate measures to address the deficiencies. Relevant home and host authorities provide for prior consultation on the actions contemplated.	1		
Average:	0.83		
<u>Aggregate KA 11 Index:</u>	0.88		

12. Access to Information and Information Sharing

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Jurisdictions ensure that no legal, regulatory, or policy impediments exist that hinder the appropriate exchange of information, including firm-specific information, between supervisory authorities, central banks, resolution authorities, finance ministries, and the public authorities responsible for guarantee schemes. In particular:			
(i) the sharing of all information relevant for recovery and resolution planning and for resolution should be possible in normal times and during a crisis at a domestic and a cross-border level	1	Article 90 (1-4)	OJ 2014/59/EU L173/35
(ii) the procedures for the sharing of information relating to G-SIFIs should be set out in institution-specific cooperation agreements (see Annex I)	0.5		
(iii) where appropriate and necessary to respect the sensitive nature of information, information sharing may be restricted but should be possible among the top officials of the relevant home and host authorities	1	Article 98 (1-3)	OJ 2014/59/EU L173/323
Average:	0.83		

Index Based on FSB Text:	Score:	BRRD Citation	BRRD Page Number
Jurisdictions require firms to maintain Management Information Systems (MIS) that are able to produce information on a timely basis, both in normal times for recovery and resolution planning and in resolution. Information is available at the group level and the legal entity level (taking into account information needs under different resolution scenarios, including the separation of individual entities from the group). Firms are required, in particular, to:			
(i) maintain a detailed inventory, including a description and the location of the key MIS used in their material legal entities, mapped to their core services and critical functions	1		
(ii) identify and address exogenous legal constraints on the exchange of management information among the constituent entities of a financial group (for example, as regarding the information flow from individual entities of the group to the parent)	1		
(iii) demonstrate, as part of the recovery and resolution planning process, that they are able to produce the essential information needed to implement such plans within a short period of time (for example, 24 hours)	1		
(iv) maintain specific information at a legal entity level, including, for example, information on intra-group guarantees and intra-group trades booked on a back-to-back basis	1	Annex: Section B (1-21)	OJ 2014/59/EU L173/345
Average:	1.00		
<u>Aggregate KA 12 Index:</u>	0.92		

<u>Aggregate Resolution Regime Index:</u>	
Aggregate KA 1 Index	0.56
Aggregate KA 2 Index	0.81
Aggregate KA 3 Index	0.88
Aggregate KA 4 Index	0.75
Aggregate KA 5 Index	1.00
Aggregate KA 6 Index	0.80
Aggregate KA 7 Index	0.93
Aggregate KA 8 Index	0.33
Aggregate KA 9 Index	0.88
Aggregate KA 10 Index	1.00
Aggregate KA 11 Index	0.88
Aggregate KA 12 Index	0.92
Total Index (Average of KAs)	0.81

Annex B: The FSB Key Attributes

The Key Attributes further define an effective resolution regime, “interacting with applicable schemes and arrangements for the protection of depositors, insurance policyholders and retail investors” (page 3) as having the following qualities:

- (i) ensure continuity of systemically important financial services, and payment, clearing and settlement functions;
- (ii) protect, where applicable and in coordination with the relevant insurance schemes and arrangements such depositors, insurance policyholders and investors as are covered by such schemes and arrangements, and ensure the rapid return of segregated client assets;
- (iii) allocate losses to firm owners (shareholders) and unsecured and uninsured creditors in a manner that respects the hierarchy of claims;
- (iv) not rely on public solvency support and not create an expectation that such support will be available;
- (v) avoid unnecessary destruction of value, and therefore seek to minimize the overall costs of resolution in home and host jurisdictions and, where consistent with the other objectives, losses for creditors;
- (vi) provide for speed and transparency and as much predictability as possible through legal and procedural clarity and advanced planning for orderly resolution;
- (vii) provide a mandate in law for cooperation, information exchange and coordination domestically and with relevant foreign resolution authorities before and during a resolution;
- (viii) ensure that non-viable firms can exit the market in an orderly way; and
- (ix) be credible, and thereby enhance market discipline and provide incentives for market-based solutions.”

The Key Attributes continue (page 3) that: “Jurisdictions should have in place a resolution regime that provides the resolution authority with a broad range of powers and options to resolve a firm that is no longer viable and has no reasonable prospect of becoming so. The resolution regime should include:

- (i) stabilization options that achieve continuity of systemically important functions by

way of a sale or transfer of the shares in the firm or of all or parts of the firm's business to a third-party, either directly or through a bridge institution, and/or an officially mandated creditor-financed recapitalization of the entity that continues providing the critical functions; and

- (ii) liquidation options that provide for the orderly closure and wind-down of all or parts of the firm's business in a manner that protects insured depositors, insurance policy holders and other retail customers.”

Annex C: The Single Resolution Mechanism Regulation and its Impact on the Findings of the Consistency Index

(a) Impact with Regard to Level of Regional Consistency with KA 2 (designation of resolution authority)

The SRB has the overall responsibility for the effective and consistent function of the SRM. The function of the SRM is based on a division of tasks between the SRB and national resolution authorities of participating Member States.⁴⁵ The SRB is directly responsible for the resolution of “systemically significant” banks. The national resolution authorities are also involved, but their role is ancillary. In particular, national resolution authorities contribute to the drafting of resolution plans and to the preparation and execution of resolution schemes adopted by the SRB. The resolution of less systemically significant banks falls within the remit of national resolution authorities. This rule is subject to certain exceptions as, for example, when the SRF is to be used.⁴⁶ Accordingly, the more streamlined process of bank resolution of the SRM Regulation enhances consistency with KA 2 only with regard to instances of bank resolution that fall under the direct authority of the SRB.

With regard to consistency with KA 2.6, Article 80 of the SRM Regulation provides that Protocol No 7 on the Privileges and Immunities of the European Union annexed to the TEU and the TFEU shall apply to the Board and its staff. Compared to BRRD Article 3(12), Article 80 of the SRM Regulation is to be welcomed because it ensures greater certainty about the exact level of legal protection and, hence, it is more in line with KA 2.6. The liability of the SRB with regard to the execution of its decisions by national resolution authorities is dealt with separately and in particular in Article 87, which is far less permissive and far more detailed in its content compared with its BRRD equivalent.

(b) Impact with Regard to Level of Regional Consistency with KA 3 (resolution powers)

⁴⁵ The division of tasks in the SRM is set out in Article 7 SRM Regulation and it replicates the division of tasks in the SSM. See also Georgosouli (2016, 357-358).

⁴⁶ See SRM Regulation Article 7(3) (where the SRB replaces national resolution authorities in adopting the resolution scheme for the resolution of medium or small size banks). The SRB also takes leadership for the purposes of ensuring consistent application with ‘high resolution standards’ as per SRM Regulation Article 7 (4) (b) or when Member States decide that the SRB shall exercise all relevant powers and responsibilities (SRM Regulation Article 7 (5)).

The SRB is endowed with the same resolution powers as national resolution authorities as well as additional powers to mark the fact that the SRB has the leadership and overall responsibility of the functioning of the SRM in the Banking Union as, for example, the power to give instructions with regard to the execution of a resolution scheme.⁴⁷ According to our findings, the streamlined procedure of the SRM is likely to be instrumental to the speediness of decision making with regard to the resolution of systemically significant banks albeit not necessarily to its timely execution, hence resulting in higher consistency with KA 3 in the Banking Union.⁴⁸ This observation comes with a caveat. The procedure for the adoption of the resolution scheme by the SRB is notoriously cumbersome involving inter alia the Commission, the Council, and the ECB but nevertheless subject to formidably strict time limits. It must last no longer than 24 hours or at most 32 hours (8 hours being the period for the SRB to modify the scheme in response to objections by the Commission and the Council if any).⁴⁹ The strict time limit warrants the speediness of decision-making. The quality of decisions reached, however, will be contingent to the preparatory work during the stages of supervision and early intervention. The SRB relies on national resolution authorities for the execution of the resolution scheme, but national resolution authorities are not left entirely on their own.⁵⁰ The SRB has the power to give instructions to national resolution authorities, start investigations, and even take enforcement action to overcome problems, although these powers are very limited in scope.

(c) Impact with Regard to Level of Regional Consistency with KA 7 (legal framework conditions for cross-border cooperation), KA 8 (CMGs) and KA 9 (institution-specific cross-border cooperation agreements)

According to our findings, the SRM Regulation increases the level of regional consistency with KA 9 and, by implication, KA 8. With regard to the resolution of groups with entities established in participating and non-participating Member States, the SRM Regulation provides that national

⁴⁷ Article 29 of SRM Regulation mandates national resolution authorities to take any necessary action for the implementation of SRB decisions. In its turn, the SRB can issue guidelines and general instructions, request information, carry out investigations and on-site inspections, give instructions, and issue warnings. See SRM Regulation Articles, 28, 31 (1) (a)-(b), 34, 35, 36, 37. For a more detailed discussion see Georgosouli (2016, 357-358).

⁴⁸ National resolution authorities remain directly responsible for the resolution of less systemic banks, and the timeliness of the resolution will pretty much depend on national law subject to further rules and guidelines coming from the EBA. See Article 7 (3) SRM Regulation.

⁴⁹ See Article 18 of SRM Regulation. The Commission exercises excessive power on the endorsement of the SRB resolution scheme. Contrast here with the Commission's proposal. Originally, it was proposed that the SRB should be the last supranational "arbiter" over the resolution procedure (see the Commission's Proposal article 20 and Explanatory Memorandum 4.1.5.). The Council may reject the resolution scheme if, in the opinion of the Council, it is against the public interest but this problem is likely to arise as long as the Commission decides to get the Council involved.

⁵⁰ SRM Regulation Article 29(1).

resolution authorities shall be represented by the SRB for the purposes of cooperation and consultation with non-participating Member States or third countries. Similarly, where a group includes entities established in participating Member States and subsidiaries established or significant branches located in non-participating Member States, the SRB shall communicate any plans, decisions, or measures relevant to the group.⁵¹ The representation of national resolution authorities by the SRB reduces the number of resolution authorities participating at the college level. It simplifies the process and, where appropriate, can be instrumental to the taking of a joint course of action.

Moreover, Article 33(1) SRM Regulation endows the SRB with the power to assess and make recommendations as to the recognition and enforcement of third-country resolution proceedings. These recommendations are addressed to national resolution authorities of participating Member States, which in their turn must either implement them or deviate, providing reasons justifying the case for taking a separate course of action.⁵² The requirement to give reasons is likely to enhance policy coherence and greater transparency in the recognition and enforcement of foreign resolution proceedings in the Banking Union.

(d) Impact with Regard to Level of Regional Consistency with KA 12 (access to information and information sharing):

See above KA 2.7.

⁵¹ Article 32 SRM Regulation and recital 91 of the Preamble to SRM Regulation.

⁵² Recommendations are not legally binding. See, however, T. Tridimas (2012, 71) (arguing in relation to the European Securities and Markets Authority that recommendations represent the heavy hand of soft law). For further discussion in the context of EU bank resolution see Georgosouli (2016).

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